Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, Governor of the State of Alabama, *et al.*,
Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

DOUGLAS T. SMITH, *et al.*,
Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANTS DOUGLAS T. SMITH, ET AL.

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QUESTIONS PRESENTED

1. Does a moment of silence for individual silent "prayer or meditation" at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?

LIST OF ALL PARTIES

Undersigned counsel of record for Intervenors-Appellants certify that the following listed parties have an interest in the outcome of this case.

Ishmael Jaffree, Jamel Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree, named plaintiffs herein.

The Board of School Commissioners of Mobile County, Alabama; the Mobile County School Board Commissioners, Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth Drago and Dr. Robert Gilliard; Dr. Abe Hammons, Superintendent of the Board of Education of Mobile County; Mobile County School teachers, Julia Green, Charlene Boyd and Pixie Alexander, Mobile County School principals, Annie Bell Phillips, Betty Lee and Emma Reed.

Defendants-Intervenors: Bobby and Emily Cook, Thomas and Sibyll Bends, Linda Drashman, Mrs. Steve Cooper, Joanne DeBenedetto, Bill Flowers, Vonna Tuberville, Mrs. Ralph O. Kelly, Joel C. Kelley, Lamar Guyton, Mrs. Abbie D. Tamblyn, Joseph R. Thompson, Bill Norton, Wayne Ward, Faye R. Sellers, Billie Jack Mitchell, Sr., Glenn Wiley, Tom Jones, James M. Dodd, Jr., Judith R. Dodd, William Glen Byron, Bobby Schiferly, Mr. and Mrs. A. W. Lawrence, Eva Hendrix, Dorothy K. Chancy, Ed and Carol Lietz, Cindy Elliott, G. N. Burrows, Paul J. Reid, John V. Hendrix, Julia A. Reib, Mary Taylor, Rev. and Mrs. Joseph L. Garlington, R. Bruce Vandiver, Mrs. R. Bruce Vandiver, Mrs. R. F. Wallace, Mrs. Moya Wells, Mr. Larry Wells, Wanda Brooks, Jerry Brooks, Ronald Glaze, Myra Thompson, Betsy Miller, Barbara Williams, Jack Christensen, Donald E. Thompson, Sonja Thompson, Jacqueline R. Peters, Michael J. Puckett, A. Rodney Applegate, Jr., J. E. Solomon, Virginia Stonestreet, Marti Pulliam, Jimmy Jones, Marie Woodham, Susan S. Hahn, Tim McGraw, Charles R. Smith, Mr. and Mrs. Jefferson C. McGee, George E. Fisher, Chris Evans, Don Sissons, Georgia

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George Wallace, Governor of the State of Alabama.

Charles Graddick, Attorney General for the State of Alabama.

Members of the Alabama State Board of Education: John Tyson, Jr., Ron Creel, S. A. Cherry, Ralph Higginbotham, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., and Roscoe Roberts.

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BRIEF OF APPELLANTS DOUGLAS T. SMITH, ET AL.

OPINIONS BELOW

The Preliminary Injunction of the United States District Court, Southern District of Alabama, was issued and reported on August 9, 1982, in *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982) (reprinted in the Jurisdictional Statement Appendix of Governor George C. Wallace [hereinafter referred to as Wallace] No. 83-812 at JS 64d).[1] This Preliminary Injunction was later vacated by an Order of the court issued and

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[1] References to "JS ——" are to appropriate pages of the Appendix to the Jurisdictional Statement of Wallace No. 83-812.

reported on January 14, 1983, in *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983). (JS 56d) The Memorandum Opinion was issued and reported on the same day in the companion case of *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983). (JS 1d) The two cases were consolidated upon appeal, and Wallace was substituted for Governor Fob James. The Opinion of the United States Court of Appeals for the Eleventh Circuit, affirming in part, reversing in part, and remanding with directions, was issued on May 12, 1983, in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). (JS 1a) The per curiam decision of the court of appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc, with an accompanying dissent written by Judge Roney, was issued on August 15, 1983, in *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. 1983). (JS 1b) The district court then issued an order enforcing the order of the court of appeals and enjoining the statutes and activities there held to be unconstitutional, on October 14, 1983. (JS 62d)[2]

JURISDICTION

Jurisdiction of this Court, to review the final judgment of the court of appeals that held a state statute or an activity treated as a state statute unconstitutional, is conferred by 28 U.S.C. § 1254(2).

A Notice of Appeal by the Appellants Douglas T. Smith, et al. [hereinafter referred to as Smith] (the Defendant-Intervenors at the trial court) to the judgment of the court of appeals was filed on November 2, 1983 (reprinted in Appendix 3a to Jurisdictional Statement of Appellants Smith). Probable jurisdiction was noted by this Court on April 2, 1984, as to the constitutionality of a period of silence for meditation or voluntary prayer. ALA. CODE § 16-1-20.1 (1981).

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[2] References to the Appendix in this brief are designated by a number and the letter "a", such as "5a".

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to the Jurisdictional Statement of Appellants Smith contains in full the following provisions: article VI, clause 2 and the first and tenth amendments to the United States Constitution (at 1a); only the relevant portions of the fourteenth amendment of the United States Constitution (at 1a) and of the Northwest Ordinance of 1789 (at 2a); and ALA. CODE § 16-1-20.1 (1981) (at 2a).

STATEMENT OF THE CASE

Appellee, Ishmael Jaffree (hereinafter referred to as Jaffree), on behalf of his three minor children enrolled in the Mobile, Alabama public school system, brought this action against the Board of School Commissioners of Mobile County, Alabama, requesting a permanent injunction against (1) all activities designed to encourage a belief in religion and (2) all teaching from *all instructional materials* which furthers a belief in religion. (R. 8, 9)[3] Jaffree then amended his complaint to ask that ALA. CODE § 16-1-20.1 (1981), providing a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer", be declared unconstitutional. Governor Fob James was added as a named defendant. (R. 92-100)

The trial judge, Judge W. Brevard Hand, issued a preliminary injunction (JS 64d) against the enforcement of the statute. The court stated, however, that "[t]his Court will not by judicial fiat delineate what a teacher or student may do in regard to his personal religious benefits for these are matters of personal conscience."[4] (JS 75d)

Seventeen people (R. 252-57) were allowed to intervene as party defendants. (R. 704) Following a motion

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[3] "(R. ——)" will hereinafter designate the appropriate page of the Record on Appeal; "(T. ——)" will hereinafter designate the appropriate page of the Trial Transcript.

[4] *Jaffree v. James*, 544 F. Supp. at 733.

filed October 22, 1982, 607 additional teachers, parents and students were allowed to join the original seventeen and have since continued as Intervenors. (R. 424) Appellants Smith, through their counsel, actively participated in the November 1982 trial on the merits, by presenting five expert witnesses and three teachers, one parent, and one student as witnesses, as well as by cross-examination, oral arguments and the submission of briefs.

The district court on January 14, 1983, entered an order for want of jurisdiction, stating:

> This Courts' review of the relevant legislative history surrounding the adoption of both the first amendment and the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate . . . .[5]
>
> Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.[6]

The plaintiff appealed to the Eleventh Circuit Court of Appeals (R. 522), which reversed the district court's dismissal of the case, holding that the one-minute period of silence for meditation or prayer was a violation of the establishment clause.[7] The court further held that the establishment clause prohibited "any government involvement with religion" (JS 8a) and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation,"

[5] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128 (JS 48d-49d).

[6] *Jaffree v. James*, 554 F. Supp. 1130 (JS 56d).

[7] *Jaffree v. Wallace*, 705 F.2d at 1533-36. ALA. CODE § 16-1-20.1 (1981).

(JS 18a) implying that teachers may not discuss any religious matters in public school.[8]

A dissent by four judges on the court of appeals to the denial of rehearing, written by Judge Roney, argued that the statute which provides for a moment of silence for meditation or permissive prayer, is neutral and "facially and operationally constitutional."[9] (JS 4b)

SUMMARY OF ARGUMENT

This case provides the Court with a unique opportunity to affirm the clear language of the Constitution, the intent of the Founding Fathers, and history of the contemporaneous period regarding the constitutionality of a moment of silence for permissive prayer or meditation. The *language* of the establishment clause does not forbid a moment of silence, and, as this Court has recently ruled, does not "require complete separation of church and state . . . ." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984).

The *framers' manifest intent* was to allow in governmental institutions the widespread practice of individual silent prayer and meditation, which was not seen as the establishment of a national church. The *contemporaneous history* shows many forms of permissible oral prayer—which a fortiori justifies individual silent prayer or meditation. The Northwest Ordinance, for example, passed 58 days prior to the establishment clause, provided federal land for schools which were encouraged to teach religion and morality.[10] Grants of land to the Alabama territory were similarly restricted as to use.[11]

The record contains numerous historical documents and treaties introduced as evidence for the trial court to pass upon, as well as the testimony of expert witnesses on the

[8] *Jaffree v. Wallace*, 705 F.2d at 1531 and 1536.

[9] *Jaffree v. Wallace*, 713 F.2d at 616.

[10] Northwest Ordinance, ch. 8, art. III, 1 Stat. 50, 52 (1789).

[11] Mississippi Territory Act, ch. 28, § 6, 1 Stat. 549, 550 (1798).

history of the Constitution. Much of this material is newly discovered and was not available to this Court when it ruled in *Everson v. Board of Education*, 330 U.S. 1 (1947), *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). The evidence was presented in an adversarial context, with opportunity for attorneys and the court to cross-examine experts and their sources of evidence.[12] Further historical material makes clear that the establishment clause was never applied to the states by the fourteenth amendment.

To forbid individual silent prayer or meditation would be the governmental "hostility" and certainly "callous indifference" to religion that the establishment clause forbids. *Lynch v. Donnelly*, 104 S.Ct. at 1359; *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952). The precedents of this Court for the first 160 years of our history until *Everson*, and the primary precedents of this Court since *Everson*, uniformly require that it overrule the court

[12] The Opinion of the court below relied heavily on the recent scholarship of Professor Robert L. Cord of Northwestern University in R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) (introduced into evidence as Defendant-Intervenors' Exhibit 14 at T. 571-72), copies of which have been lodged with the Office of the Clerk for the convenience of this Court and excerpted in the Appendix to this brief at 28a-43a) on the language, intent and history of the establishment clause of the first amendment, and on Professor Raoul Berger of Harvard Law School in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) on the language, intent, and history of the fourteenth amendment, as well as the scholarly testimony of James McClellan, former professor at Emory University and former Chief Counsel to the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. Professor McClellan's study *The Making and the Unmaking of the Establishment Clause* in A BLUEPRINT FOR JUDICIAL REFORM (1981) [hereinafter cited as McClellan, *Establishment Clause*] and the chapter *Christianity and the Common Law* from JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971) [hereinafter cited as MCCLELLAN, JOSEPH STORY] were introduced into evidence as Defendant-Intervenors' Exhibits 12 (T. 571-72) and 13 (T. 571-72), respectively.

of appeals' decision below and other federal court decisions questioning the constitutionality of silent prayer or meditation.

ARGUMENT

A MOMENT FOR INDIVIDUAL SILENT PRAYER OR MEDITATION AT THE BEGINNING OF EACH SCHOOL DAY IN PUBLIC SCHOOL CLASSROOMS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Alabama statute before this Court does not mandate that any particular religious or non-religious activity be allowed, but merely allows a teacher to set aside time for the class to silently engage in individual prayer or meditation. The statute does not require either religious or non-religious content for the moment of silence. Meditation may be theistic or nontheistic, accommodating "all faiths and all forms of religious expression" [13] and philosophic belief.

This Court has uniformly rejected the extreme approach to the establishment clause of an absolute wall of total separation between church and state. As stated by the Court in *Lynch v. Donnelly*, 104 S.Ct. at 1362, the tripart test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is not exclusive and not always relevant. In *Marsh v. Chambers*, 103 S.Ct. 3330 (1983) and, to some extent, in *Larson v. Valente*, 456 U.S. 228 (1982), this Court did not employ the tripart test but instead employed the historical test.[14]

[13] *Lynch v. Donnelly*, 104 S.Ct. at 1361, citing *Zorach v. Clauson*, 343 U.S. 306. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 104 S.Ct. at 1362. As is evident in the subsequent sections, the drafters of the establishment clause believed that the teaching of religion and practice of prayer in public schools had a secular purpose—good government and the betterment of mankind.

[14] For the effects of these decisions on subsequent lower court rulings *see, e.g., Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y.

The historical test should be applied in this case to the moment of silence for permissive prayer or meditation in public schools, just as it was applied in *Marsh* to uphold the prayers offered by a state-paid chaplain to a state legislature. However, if the tripart test is applied, the primary effect and purpose of a moment of silence are constitutional under *Lynch* and *Marsh*, with no excessive entanglement.

A. The Establishment Clause Does Not Prohibit Individual Silent Prayer or Meditation in Public Schools, as Demonstrated by Its Judicial Construction, Intended Meaning, and Contemporaneous History.

This Court's construction of the establishment clause has consistently rejected the extreme approach of an absolute wall of total separation of church and state that would bar a moment for individual silent prayer or meditation. This Court recently has authorized alternatives to the tripart test, and has employed the historical test, which strongly supports the constitutionality of a moment of silence. The historical adoption of the Northwest Ordinance, by the same First Congress that adopted the establishment clause, and the historical permissibility of prayer in federal public schools and in other governmental institutions argue strongly for the constitutionality of a moment of silence. As discussed in Section B, *infra*, the language and intended meaning of the establishment clause similarly does not in any way prohibit a moment for individual silent prayer or meditation.

1. *Supreme Court Construction Rejecting the Extreme Approach of an Absolute Wall of Total Separation of Church and State.*

This Court, in its most recent pronouncement on the establishment clause, held:

> The concept of a "wall" of separation is a useful figure of speech probably deriving from views of

1984) following *Marsh v. Chambers* in applying the historical test to the Army chaplaincy.

> Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is *not a wholly accurate description* of the practical aspects of the relationship that in fact exists between church and state.
>
> . . . "It has never been thought either possible or desirable to enforce a regime of total separation. . . ." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L. Ed. 2d 948 (1973). *Nor does the Constitution require complete separation of church and state*; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). . . .
>
> . . . .
>
> This history may help explain why the Court consistently has *declined to take a rigid, absolutist view* of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*." *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970) (Emphasis added). In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Lynch v. Donnelly, 104 S.Ct. at 1359-1361 (emphasis added, footnotes omitted).[15]

[15] The Court has often relied on its 1878 adoption of the phrase "wall of separation" in *Reynolds v. United States*, 98 U.S. 145, 163-65 (1878). The poor scholarship employed in that decision is evidenced by the fact that the Court (1) did not review the debates to find the intent of Congress and the ratifying state legis-

Similarly, this Court held that its establishment clause decisions "do not call for total separation of church and state," and that the necessary partial separation "far from being a 'wall,' is a blurred, indistinct, and variable barrier," in the very decision that laid down the tripart test. *Lemon v. Kurtzman*, 403 U.S. at 614, *quoted in Lynch v. Donnelly*, 104 S.Ct. at 1362. It warned that the "metaphor of a 'wall' or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis. . . ." *Gillette v. United States*, 401 U.S. 437, 450 (1971). This Court noted that the "First amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . ." *Zorach v. Clauson*, 343 U.S. at 312, *quoted in Walz v. Tax Commission*, 397 U.S. at 669. Also, the Supreme Court recently sustained the constitutionality of spoken group prayer—not just a moment for permissive silent individual prayer or meditation—in *Marsh v. Chambers*, 103 S.Ct. 3330.

As a result, this Court has permitted a number of activities in public schools and in other governmental institutions that would contravene an extreme position of an absolute wall of total separation of church and state. Some examples were recounted in *Lynch v. Donnelly*:

> There is an unbroken history of official acknowledgment by all three branches of government of a role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively

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latures; (2) did not look to contemporaneous acts of Congress to find its intent; (3) relied on Madison's writing about and for another event, his *Memorial and Remonstrance*; and (4) looked to Jefferson's 1802 "wall of separation" letter, while noting that he was absent as minister to France during the drafting, debate and adoption of the first amendment. The irony of *Reynolds*, however, is that the Court correctly used the contemporaneous act method to find Virginia's legislative intent for its anti-polygamy statute, passed subsequent to its act establishing religious freedom. This failure to use the contemporaneous act approach for the first amendment as well has caused many of the Court's apparent inconsistencies in interpreting the establishment clause.

expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson supra*, 343 U.S. at 313, 72 S.Ct., at 684.

See also *Abington School District v. Schempp*, 374 U.S. 203, 213, 83 S.Ct. 1560, 1566, 10 L. Ed. 2d 844 (1963).

Our history is replete with *official references to the value and invocation of Divine guidance* in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to *give thanks* for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. Ch. 167, 16 Stat. 168 (1870). That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. See J. Res. 5, 23 Stat. 516 (1885). Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed *national*

motto "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. § 324, and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by thousands of public school children—and adults—every year.

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. . . .

There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. Congress has directed the President to proclaim a *National Day of Prayer* each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h. Our Presidents have repeatedly issued such Proclamations. Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week, Proclamation No. 4844, 46 Fed. Reg. 25,077 (1981), and the Jewish High Holy Days, 17 Weekly Comp. Pres. Doc. 1058 (Sept. 27, 1981). One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach, supra*. Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." *Id.*, 343 U.S. at 314, 72 S.Ct., at 684.

Lynch v. Donnelly, 104 S.Ct. at 1360-61 (emphasis added, footnotes omitted).

A moment for individual silent prayer or meditation was sustained by a three-judge district court panel in *Gaines v. Anderson*, 421 F.Supp. 337 (D. Mass. 1976), applying this Court's nonabsolute approach to the establishment clause. (Several other courts have struck down

similar statutes, often employing an erroneous absolute approach to the establishment clause.[16]) The court in *Gaines* held:

> The requirements of the First Amendment do not implicate hostility to religion or indifference toward religious groups; they do not import a preference for those who believe in no religion, or demand primary devotion to the secular.
>
> The 1973 amendment is framed in the disjunctive, and the statute as amended permits meditation or prayer without mandating the one or the other. Thus, the effect of the amended statute is to accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters.

Id. at 343. That decision embodies the proper constitutional analysis for this case.

2. *Supreme Court Authorization of Alternatives to the Tripart Test and Use of the Historical Test.*

This Court has explicitly noted that the tripart test (laid down in *Lemon*) is not the exclusive test to be used in establishment clause cases. It held in *Lynch*:

> But, we have repeatedly emphasized our *unwillingness to be confined to any single test or criterion in this sensitive area. See e.g. Tilton v. Richardson*, 403 U.S. 672, 677-678 (1971); *Nyquist, supra*, 413 U.S., at 773. In two cases, the Court did *not even apply the Lemon "test."* We did not, for example, consider that analysis relevant in *Marsh, supra*. Nor did we find *Lemon* useful in *Larson v. Valente*, 456 U.S. 228 (1982), where there was substantial evidence of overt discrimination against a particular church.

Lynch v. Donnelly, 104 S.Ct. at 1362 (emphasis added). This Court has made similar statements in *Mueller v.*

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[16] *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *May v. Copperman*, 572 F. Supp. 1561 (D.N.J. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982).

Allen, 103 S. Ct. 3062, 3066 (1983), and *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

The Supreme Court recently used the historical test instead of the tripart test in *Marsh v. Chambers*:

> The Court's interpretation of the Establishment Clause has comported with what history reveals was the *contemporaneous understanding* of its guarantees. . . . In the very week that Congress approved the Establishment Clause as a part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate. In *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330, 77 L. Ed. 2d 1019 (1983), we noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official Legislative Chaplains to give opening prayers at sessions of the state legislature. *Id.*, at ——, 103 S.Ct., at 3336.
>
> The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the *greatest weight in the interpretation* of that fundamental instrument," *Myers v. United States*, 272 U.S. 52, 174-75, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926).
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> . . . .
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> . . . We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as *illuminated by history*." *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970).

Lynch v. Donnelly, 104 S.Ct. at 1359, 1361 (emphasis added). That historical test leads inexorably to the constitutionality of a moment for individual silent prayer or meditation, as the remainder of this brief argues.

3. *Contemporaneous History of Passage of the Northwest Ordinance by the First Congress.*

The Northwest Ordinance, enacted by the very Congress that adopted the first amendment, provides:

> *Religion, morality*, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Ch. 8, art. 3, 1 Stat. 50, 52 (Aug. 7, 1789) (emphasis added). (Appendix to the Jurisdictional Statement of Appellants Smith at 2a.)

Justice Douglas, concurring in *Engel v. Vitale*, 370 U.S. at 443, noted that "[r]eligion was *once* deemed to be a function of the public school system" (quoting the Northwest Ordinance set out above).[17] However, the Supreme Court has never examined Congress' contemporaneous passage of the Ordinance to see what light it sheds on the meaning of the establishment clause.

On July 10, 1787, a committee consisting of James Madison of Virginia, Nathan Dane of Massachusetts, and three other members of the Continental Congress reported a resolution authorizing a contract for surveying and sale of federal lands northwest of the Ohio River.[18] Lot No. 16 in each Township was given perpetually for the purpose of "*public education*" (as set out in the Ordinance of May 20, 1785), and Lot No. 29 in each Township was given perpetually for "the *purposes of religion*."[19]

On July 13, 1787, Congress specified the use to be made of the land set aside for public education. It passed the Northwest Ordinance which provided: "*Religion, Morality*

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[17] (Emphasis added). The Ordinance was also referred to in *Jones v. Opelika*, 316 U.S. 584, 622 (1942); *Meyer v. Neb.*, 262 U.S. 390, 400 (1922); and *Andrus v. Utah*, 446 U.S. 500, 522 n. 3 (1980) (Powell, J., dissenting).

[18] 32 J. OF THE CONTINENTAL CONG. 311 (1787).

[19] *Id.* at 312 (emphasis added); Ordinance of May 20, 1785, art. 3, 28 *id.* at 375, 378, dealing with grants of land to public education. *See Andrus v. Utah*, 446 U.S. at 522-23.

and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education *shall forever be encouraged.*" [20]

The Ordinance was drafted by Nathan Dane of Massachusetts, who wanted Eastern politics to be extended to the new territories and especially to Ohio, since many of its settlers had emigrated there from New England.[21] The Ordinance is a deliberate rejection of the philosophy of Thomas Jefferson, who had led the fight against tax support of religious teachers in 1785.[22]

The Ordinance follows the language of the Massachusetts and New Hampshire constitutions of 1780 and 1784, respectively. These required the local towns to appropriate tax money for the "support and maintenance of public Protestant teachers of piety, religion and morality" who would provide "public instruction in morality and religion." [23]

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[20] Northwest Ordinance, art. 3, 32 J. OF THE CONTINENTAL CONG. 334, 340 (1787) (emphasis added).

[21] Letter from Nathan Dane to Rufus King (Aug. 12, 1787), *reprinted in* 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 636 (E. Burnett ed. 1936).

[22] F. PHILBRICK, THE LAWS OF ILLINOIS TERRITORY 1809-1818 cccxxiv-cccxxv (1950).

[23] Massachusetts, the first colony to pass a public school law in 1647 requiring each township to appoint an individual to teach children the "knowledge of the Scriptures" provided by its constitution of 1780:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon *piety, religion and morality*; and as these cannot be generally diffused through a community but by the institution of public worship of God, and of *public instructions in piety*, . . . the legislature shall from time to time *authorize and require*, the several towns . . . to make suitable provision at their own expense, for the institution of public worship of God, and for the *support and maintenance of public protestant teachers of piety, religion, and morality* . . . .

MASS. CONST. of 1780, Pt. I, art. III (emphasis added).

The New Hampshire constitution of 1784 also required "*public instruction in morality and religion*" and empowered "the legislature to authorize . . . the several towns . . . to make adequate provision at their own expense for the *support and maintenance of public protestant teachers of piety, religion and morality.*" N.H. CONST. of 1784, art. VI (emphasis added). The rationale for this was that "morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government . . . ." *Id.*

When the First Congress assembled, Rep. James Madison, on June 8, 1789, reworked the proposed constitutional amendments from the states and submitted his version of the establishment and free exercise clauses to Congress for its consideration. His proposal stated: "nor shall *any national religion* be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." [24]

On July 13, 1789, the House constituted itself a committee of the whole to debate the disposition on lands in the Northwest Territory.[25] In the meantime (on July 21, 1789), after sitting idle for a month and a half, Madison's proposals for constitutional amendments, along with those of the states, were submitted to a select committee of which he was a member.[26] The same day the Northwest Ordinance had its first reading in the Senate.[27] A week later (on July 28, 1789), the select committee submitted the following version of the establishment clause to the

Georgia, which had established the Episcopal Church in 1784, also recognized the importance of religion in education, granting 20,000 acres in each county for a collegiate seminary of learning for this reason: "And whereas the encouragement of *religion* and learning is an object of great importance to any community, and must tend to the prosperity, happiness, and advantage of the same . . ." Act of Feb. 25, 1784, WATKINS DIGEST 293 (1800) (emphasis added).

[24] 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added).

[25] *Id.* at 646 (J. Gales ed. 1834).

[26] *Id.* at 660, 665 (J. Gales ed. 1789).

[27] *Id.* at 52 (July 21, 1789) (J. Gales ed. 1834).

House: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." [28]

Then on August 7, 1789, Congress re-enacted the Northwest Ordinance, which provided in Articles I and III:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his *mode of worship* or religious sentiments in the said territory.
>
> . . . .
>
> *Religion, morality*, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education *shall forever be encouraged.*[29]

The fact that Congress re-enacted the Northwest Ordinance in 1789, 58 days prior to its adopting the establishment clause in final form, indicates that Congress gave its tacit approval to Nathan Dane's plan to extend governmental support of religious teaching in public schools in the Northwest Territories, and that the First Congress did not view that as the establishment of a religion.[30] (T. 548) Moreover, Justice Douglas' statement in *Engel* about the religious function of the public school system is correct, a function which in 1789 was not seen as a violation of the establishment clause. *Engel v. Vitale*, 370 U.S. at 443.

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[28] *Id.* (J. Gales ed. 1789) at 729. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSE 123-42 (1964) [hereinafter cited as ANTIEAU, DOWNEY & ROBERTS], referred to favorably by Chief Justice Burger in *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 & 675 n. 3 (1970), for a detailed account of the debates and related newspaper accounts and letters.

[29] Northwest Ordinance, ch. 8, arts. I & III, 1 Stat. 50, 52 (1789) (emphasis added).

[30] The Ordinance also contradicts Justice Douglas' belief in *McGowan v. Md.*, 366 U.S. 420, 563 (1961) (dissenting opinion) that the establishment clause requires that "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government."

According to Chief Justice Burger in *Marsh v. Chambers*, "historical evidence sheds light not only on what the draftsmen *intended* the Establishment Clause to mean, but also on how they thought that Clause applied to the *practice authorized* by the First Congress—their actions reveal their intent." 103 S.Ct. at 3334 (emphasis added).[31]

This legislative history clearly demonstrates that the First Congress saw no conflict between the establishment clause and encouragement that religion be taught and prayers be given in the public schools in the Northwest Territory created by grants of federal land. Nor did it believe that a child would be molested in his mode of worship or religious sentiments (Article I of the Ordinance) if he were compelled to study religion in school. Instead, Congress believed that religion and schools in which religion and morality were taught were necessary to good government and the happiness of mankind. President Washington shared this belief.[32] For the men who drafted the first amendment, advancing religion and religious teaching fulfilled a vital secular purpose, establishment of good government.[33]

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[31] *Accord, Wis. v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *Boyd v. United States*, 116 U.S. 616, 623 (1886); *see also United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2582 (1983); *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977); *Walz v. Tax Comm'n.*, 397 U.S. at 686 (Brennan, J., concurring); *Frank v. Md.*, 359 U.S. 360, 370 (1959), *reh'g denied*, 360 U.S. 914 (1959); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *Myers v. United States*, 272 U.S. at 174-75, quoted with approval in *Lynch v. Donnelly*, 104 S.Ct. at 1359; *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

[32] *See* testimony of James McClellan (T. 548). President Washington in his Farewell Address of 1796 expressed the same conviction: "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." 5 W. IRVING, LIFE OF GEORGE WASHINGTON 343 (1860).

[33] The Northwest Ordinance shows that religious teaching may fulfill a secular end without violation of the establishment clause. As this Court held in *Lynch v. Donnelly*: "The Court has invalidated legislation or governmental action on the ground that a

4. *Contemporaneous History of Prayer in Federal Public Schools.*

When the First Congress encouraged the teaching of religion in the schools of the Northwest Territory, it intended and fully understood that prayer and Bible reading would be practiced in these schools, for this was the almost universal practice in the early constitutional period.[34] Since the Ordinance was patterned after the Massachusetts and New Hampshire constitutions, the practice of these states is especially relevant.[35]

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secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious consideration." 104 S.Ct. at 1362 (emphasis added).

[34] Walter H. Small cites numerous regulations from various New England communities requiring headmasters to begin and even end the school day with prayer. W. SMALL, EARLY NEW ENGLAND SCHOOLS 301-03 (1969). *See* letters and reports collected under the topic *Schools As They Were Sixty Years Ago* in the AMERICAN JOURNAL OF EDUCATION concerning Connecticut, which had morning prayers and Bible study with the Bible as the only reading book until 1793: THE AMERICAN LEGACY OF LEARNING 161-62 (J. Best & R. Sidewell eds. 1967); 13 AM. J. EDUC. 123, 129-32 (1863); 16 *id.* at 137 (1866); 26 *id.* at 225 (1876). Delaware school opened by prayer and singing a hymn: 17 AM. J. EDUC. 187-88 (1867). Rhode Island students daily recited the Lord's Prayer and Ten Commandments: 27 *id.* at 707, 711-12 (1877).

[35] According to excerpts from the Massachusetts Common School Journal, "the Bible was the only reading book, Dilworth's Spelling Book was used, and the New England Primer." This Primer contained the Lord's Prayer, the Ten Commandments, books of the Old and New Testaments, and the Shorter Catechism. 12 MASS. COMMON SCHOOL J. 311-12, quoted in 14 AM. J. EDUC. 746 (1863). In 1789, before the establishment clause was adopted by Congress, the Massachusetts legislature required all common school teachers to be certified by a minister or ministers of the community in which they were to teach that each was morally qualified for the job. Act of June 25, 1789, ch. 19, 1789 Mass. Acts 416, 418. For a study of the content and broad influence of the New England Primer and use of the Bible as a leading textbook, *see* S. COHEN, A HISTORY OF COLONIAL EDUCATION 1607-1776, 60-63, 141 (1974) and 30 AM. J. EDUC. 371 (1880).

In New Hampshire the school day began and often ended with prayer and reading from the Bible, which, with the Psalter and

Anson Phelps Stokes, whose treatise and exhaustive research is highly respected on the subject of religion in American public and private schools, concludes that the fathers of the republic were accustomed "to the teaching of religion in virtually all schools." [36] The practice applied equally to the federal territories, the states, and Washington, D.C., as noted by contemporaneous acts of early Congresses.

When Congress created the Mississippi Territory in 1798, from which Alabama was later formed, it encouraged the teaching of religion and morality in its schools by providing that the people of the territory "shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio," in the ordinance of July 13, 1787.[37] This applied the "religion" in public schools' language of the Northwest Ordinance to the Mississippi Territory. Four years later Congress reserved a section in each township for "the support of schools." [38]

When Alabama was admitted into the Union in 1819, article 6 of its constitution required that "the general assembly . . . take measures to preserve from unnecessary waste or damage such lands as are, or hereafter may be, granted by the United States for the use of schools within each township in this State, and apply the funds which may be raised from such lands in *strict conformity to the object of such grant.*" [39] The Alabama School Code

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New Testament, were the only reading books until the time of the Revolution. *See, e.g.*, W. SMALL, *supra* note 34, at 300-04; W. BURTON, THE DISTRICT SCHOOL AS IT WAS 55 (C. Johnson ed. 1928).

[36] 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 48 (1950).

[37] Act of Apr. 7, 1798, ch. 28, § 6, 1 Stat. 549, 550.

[38] Act of Mar. 3, 1803, ch. 27 §§ 11 & 12, 2 Stat. 229, 233-34; Act of Mar. 3, 1817, ch. 62, § 3, 3 Stat. 375 (dealing with survey).

[39] ALA. CONST. of 1819, art. VI (emphasis added).

of 1927 refers to article III of the Northwest Ordinance as the "parent of the educational laws of the several states and of the United States of America" and states that "religion, morality, and knowledge [are] necessary" for good government.[40]

If this Court refuses to permit Alabama school students and teachers to have a moment of individual silent prayer or meditation, the State of Alabama would be unable to carry out the very purpose of the grant of Section 16 lands as specified by the First and Fifth Congresses. Moreover, because the lands were granted by the federal government with this provision, they theoretically might now be subject to being taken back by the federal government if the state can no longer carry out the purpose for which they were granted.

Both Ohio and Mississippi also received federal school land in return for their willingness to teach religion and morality in schools financed by these lands, and Ohio even agreed with the First Congress that such a provision as to use of school lands was not a violation of the establishment of religion under its state constitution.[41]

The federal public schools in Washington, D.C. provide another strong example. When the first school district

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[40] ALABAMA SCHOOL CODE 7 (1927). North Carolina adopted the Northwest Ordinance verbatim under article IX, § 1 of its 1868 constitution. *See* N.C. CONST. of 1868, art. IX, § 1.

[41] In the same section of the 1802 constitution that protects Ohio's citizens against the establishment of religion and in their rights of conscience, Ohio's Constitutional Convention (and subsequently Congress by its admission of Ohio into the Union) approved this clause: "But religion, morality, and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." OHIO CONST. of 1802, art. VIII, § 3. Also, Mississippi, in receiving federal school lands, provided in § 14 of the seventh article of its 1817 constitution: "Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged in this State."

was organized in Washington, D.C. in 1820, the Bible and the Watts Hymnbook were perhaps the only textbooks. Thomas Jefferson was the president of the school board. His approval of this curriculum is significant since the school was operated on federal land under congressional supervision.[42]

Congressional grants for evangelistic activities also provide important contemporaneous history. Early Congresses felt it their Christian duty to civilize the Indians in the federal territories by financially assisting the spread of the gospel. (T. 565) President Washington proclaimed a treaty on January 21, 1795, with the Oneida, Tuscorora, and Stockbridge Indians by which the United States paid "one thousand dollars, to be applied in building a convenient church at Oneida," New York, in place of the one which the British had burned in the Revolutionary War.[43]

Under Presidents Washington, Adams and Jefferson, Congress granted twelve thousand acres and extended the grant on five occasions to the Moravians or "*society of the United Brethren, for propagating the gospel among the heathen*" or Indians.[44] None of the three Presidents

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[42] J. WILSON, 1 PUBLIC SCHOOLS OF WASHINGTON 4-6 (Records of the Columbia Historical Society of 1897). Jefferson, as author of the much quoted "wall of separation" phrase, apparently saw no conflict between this federal public school practice and the establishment clause. However, Jefferson's views are really not relevant to the meaning of the establishment clause, because he did not participate in the first amendment debates, and was instead in Europe as minister of France from 1784 to November 1789.

[43] Treaty of Dec. 2, 1794, art. 4, 7 Stat. 47-48.

[44] Act of June 1, 1796, ch. 46, 1 Stat. 490-91 (4th Cong.) (emphasis added); re-enacted Act of Mar. 2, 1799, ch. 29, 1 Stat. 724 (6th Cong.); Act of Mar. 1, 1800, ch. 13, 2 Stat. 14-16 (6th Cong.); Act of Apr. 26, 1802, ch. 30, 2 Stat. 155 (7th Cong); Act of Mar. 3, 1803, ch. 30, 2 Stat. 236-37 (7th Cong.); and Act of Mar. 19, 1804, ch. 26, 2 Stat. 271-72 (8th Cong.), quoted in R. CORD, *supra* note 12, at 42-46, 62 & 263-70. Land was originally set aside by the Continental Congress for propagating the gospel among the heathen by Ordinance of May 20, 1785, 28 J. OF THE CONTI-

vetoed these six acts, indicating that they did not find them to be a violation of the establishment clause. (42a)

On October 31, 1803, Jefferson asked the Senate to give consent to a treaty with the Kaskaskia Indians that contained the following clause (T. 540):

> And whereas, *The greater part of the said tribe have been baptized and received into the Catholic church* to which they are much attached, the *United States will give annually for seven years one hundred dollars towards the support of a priest of that religion*, who will engage to perform for the said tribe the duties of his office and also to *instruct* as many of their *children* as possible in the rudiments of literature. And *the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.*[45]

Professor Cord cites page after page of early congressional enactments that provided federal land or appropriated federal funds to establish and fund Indian schools to the Moravians, the Missionary Society of New York, the Hamilton Baptist Missionary Society of New York, the American Board of Commissioners for Foreign Missions, the Baptist Board for Foreign Missions, the Cumberland Missionary Society, the United Foreign Mission Society of New York and the Foreign Mission Society of the Synod of South Carolina.[46]

NENTAL CONG. 375-81; Ordinance of July 23, 1787, 33 *id.* 399-401; Ordinance of July 27, 1787, *id.* 429-30; and Ordinance of Sept. 3, 1788, 34 *id.* 485-86. James Madison sat on the committee proposing this grant of land for the later ordinance.

[45] Treaty with the Kaskaskia Indians of Oct. 31, 1803, No. 104, 7 Stat. 78-79 (8th Cong.) (emphasis added), quoted in R. CORD, *supra* note 12, at 38-39, 261-63 (37a).

[46] *See* R. CORD *supra* note 12, at 63-73. In granting government land for religious purposes, Congress was simply following the practice of the states. Nine of the original thirteen states supported the teaching of religion in public or private schools with tax money or land. In addition to Massachusetts, New Hampshire, and Georgia (noted earlier, *supra* note 23), Rhode Island, Connecticut, New York, Pennsylavnia, South Carolina and North Carolina granted

These contemporaneous acts of the early Congresses indicate that prayer and the teaching of religion in schools under federal control were seen as fulfilling a valid national purpose, the moral and spiritual preparation of Americans to take a useful role in our society. Especially the Indians, who had not previously experienced the benefits of a Christian civilization, would be better citizens by their receiving the gospel, and Congress singled out specific denominational groups to propagate it. However, since no national church was being established in doing so, neither Congress nor the courts found these acts offensive to the first amendment. Applying the historical test to the establishment clause, a state may constitutionally allow a period for silent individual prayer or meditation.

5. *Contemporaneous History of Prayer in Other Governmental Institutions.*

The day after the first amendment was approved in the House in its final form, Federalist Elias Boudinot of New Jersey asked that "all the citizens of the United States [be offered an opportunity] of joining, with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured upon them." By resolution, he requested that the President "recommend to the people of the United States a day of public thanksgiving and prayers."

However, Mr. Boudinot went further, even suggesting to the people the form of the prayer, "to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of

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state land for the support of religious schools. *See, e.g.*, II STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY 260-326 (1902); 27 AM. J. EDUC. 712 (1877); VIII CONN. STATE RECORDS 100 (1795); Act of Apr. 9, 1795, ch. 75, N.Y. Laws 18th Sess. 50-51; ch. 2557, 1791-1793 Pa. Laws 71-73; Act of Dec. 21, 1799, S.C. Stat. 357; *see also* ANTIEAU, DOWNEY & ROBERTS, *supra* note 28, at 62-72, 167-74.

government for their safety and happiness." [47] Although the resolution does not specify if the prayer should be verbal or silent, verbal prayer is implied by calling for public prayer, which was customarily oral in the eighteenth century.

Anti-Federalist Aldanus Burke of South Carolina immediately objected to "this mimicking of European customs, where they made a mere mockery of thanksgivings." [48] Thomas Tucker, also of South Carolina, but a Federalist, objected to the resolution because it was "a religious matter, and, as such, proscribed to [Congress]," apparently referring to the establishment clause passed the day before.[49]

Roger Sherman, a Connecticut Federalist, perhaps reflecting the position of the established Congregational Church of his state, found precedent for such days of thanksgiving in Scripture as at the time Solomon built the temple and "worthy of Christian imitation on the present occasion." [50] Mr. Boudinot quoted further precedents from the practice of the Continental Congress. The motion carried and President Washington on October 3, 1789, issued the Proclamation.[51]

As Chief Justice Burger points out in *Marsh v. Chambers*, 103 S. Ct. at 3335, the evidence of opposition to and subsequent approval of a resolution "infuses [the force of the historical argument] with power by demon-

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[47] 1 ANNALS OF CONG. 914 (J. Gales ed. 1789). *See* R. CORD, *supra* note 12, at 27-29.

[48] *Id.*

[49] *Id.* at 915. Both men had voted against the amendment the previous day.

[50] *Id.*

[51] *Id.* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 64 (Richardson ed. 1901). President Washington issued a subsequent proclamation on January 1, 1795. *Id.* at 179-80. John Adams issued two and James Madison four during their terms as president. *Id.* at 268-70, 284-86, 513, 532-33, 558 & 560-61. See R. CORD, *supra* note 12, at 51-53, 251-60.

strating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society."

Since the resolution was directed toward all the people of the United States, both adults and children, apparently teachers and students were to participate. As with the Northwest Ordinance, there is no evidence that Congress sought to protect children from being compelled to pray. Instead, there is evidence that Congress intended to include them without any fear that it was establishing a religion by doing so.

Prayers were offered in the Congress, in the courts, and after the first inaugural ceremony at St. Paul's Chapel led by the congressional chaplain.[52] Also, the First Congress authorized the President "by and with the advice and consent of the Senate" to appoint a chaplain for the "military Establishment of the United States." [53] Of great significance is Jefferson's Act of April 10, 1806, which "earnestly recommended" that army officers and enlisted men attend Divine worship services. Irreverent behavior by officers at Divine worship services was to be punished by court marshal with Presidential reprimand. (T. 541)[54]

After a comprehensive 302-page examination of the debates and acts of Congress and the individual states,

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[52] See *Marsh v. Chambers*, 103 S.Ct. 3330, 3333-34 (1983); *Abington School Dist. v. Schempp*, 374 U.S. 203, 213 & 309-10 (1963) (Brennan, J. concurring); *Engel v. Vitale*, 370 U.S. 421, 446-50 (1962) (Stewart, J., dissenting); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 253-54 (1948) (Reed, J., dissenting); and *Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y. 1984), holding that the Army chaplaincy does not violate the establishment clause, but is an effort to allow all soldiers to worship as they choose without coercion.

[53] Act of Mar. 3, 1791, ch. 28, §§ 1, 5, 1 Stat. 222-23. The compensation for the chaplain was to be "fifty dollars per month, including pay, rations and forage." *Id.* § 6.

[54] Act of Apr. 10, 1806, ch. 20, art. 2, 2 Stat. 359-60 (9th Cong.).

Professor Cord concludes, as has this Court, that Congress intended only to prevent the establishment of a national church. He adds: "[n]or does any substantial evidence suggest that nondiscrimiantory or indirect aid to religion or to religious institutions was to come under the ban of the First Amendment."[55] Alabama does not establish any national religion by the challenged statutes; instead, its allowing permissive silent prayer or meditation "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. at 314.

B. The Establishment Clause Prohibits Only the Establishment of a National Church, as Shown by its Language and Intended Meaning.

The Court declared in *Lynch v. Donnelly*, 104 S.Ct. at 1361, that "[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government," quoting Justice Joseph Story.[56] Many constitutional scholars have reached the same conclusion, that the establishment clause forbids only the creation of a national established church, such as is indicated by former Justice Joseph Story, Professor Robert L. Cord of Northeastern University, the late Professor Mark DeWolf Howe of Harvard, Dr. James McClellan, formerly of Emory University, Professor John Baker of Louisiana State University Law School, Professor Wilbur Katz of University of Chicago Law School, Professor Peter Kauper of University of Michigan Law School, Professor Thomas Cooley of University of Michi-

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[55] R. CORD, *supra* note 12, at 50. *See Lynch v. Donnelly*, 104 S.Ct. at 1361.

[56] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833) [hereinafter cited as STORY'S COMMENTARIES], also quoted by Chief Justice Warren in *McGowan v. Maryland*, 366 U.S. 420, 441 (1961). *Accord, McCollum v. Bd. of Educ.*, 333 U.S. at 244 (Reed, J., dissenting). Joseph Story was a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as professor of law at Harvard Law School.

gan, Professor Edward Corwin of Princeton University, and Professor Walter Berns of University of Toronto, to mention a few.[57]

The district court below, relying on the exhaustive historical research of Professor Robert L. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (Defendant-Intervenors' Exhibit 14), and the testimony and studies of Appellants' expert, Professor James McClellan (T. 519-606 and Defendant-Intervenors' Exhibits 12 and 13), reached the same conclusion as the *Donnelly* court:

> The First Amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. . . . The drafters of the First Amendment understood the First Amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the First Amendment.[58]

As Anson Stokes in his more exhaustive three volume work, CHURCH & STATE IN THE UNITED STATES, and Appellants' expert witness James McClellan in his essay, *The Making and the Unmaking of the Establishment Clause*, suggest that to the drafters of the first amendment, there were seven criteria of when a church was historically established in one of the early states: (1) salaries of the ministers of that church were paid from tax money; (2) the buildings of the established church were maintained with tax funds; (3) school teachers of

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[57] *See also* Justice Rehnquist, dissenting, in *Thomas v. Rev. Bd.* 450 U.S. 707, 721-22 (1981) and in *Stone v. Graham*, 449 U.S. 39, 45-46 (1980); Justice Stewart, dissenting, in *Abington School Dist. v. Schempp*, 374 U.S. 203, 309-310 and *Engel v. Vitale*, 370 U.S. at 445; and Justice Reed, dissenting, in *McCollum v. Bd. of Educ.*, 333 U.S. at 245-46, where he refers to Jefferson's accommodation of religious sects at the University of Virginia.

[58] *Jaffree v. Bd. of School Comm'rs.*, 554 F. Supp. at 1115 (JS 21d-22d). (T. 529-30).

the established church were paid with tax money; (4) only clergy from the established church were permitted to marry and bury; (5) a penalty was levied for not attending the services of the established church; (6) only members of the established church could preach; and (7) office holding was limited to members of the established church.[59]

Five of the thirteen states had continued their religious establishments when the Constitutional Convention met in Philadelphia in 1787: Connecticut, Massachusetts and New Hampshire supported the Congregational Church, and Georgia and South Carolina the Anglican Church.[60] These states jealously guarded their religious practices and control over their public schools. They were not about to give up their authority to the federal government.[61]

During the debates over ratification of the Constitution, five states without established churches proposed amendments to the First Congress to prohibit the federal government from establishing a national sect.[62]. One

[59] 1 A. STOKES, CHURCH & STATE IN THE UNITED STATES 358-446 (1950); McClellan, *Establishment Clause*, *supra* note 12, at 300-08. *See also Larson v. Valente*, 456 U.S. 228, 244, n. 19 (1982) for Massachusetts' experience.

[60] R. CORD, *supra* note 12, at 4.

[61] The tension between these five states and the five states which petitioned the First Congress for an amendment *preventing* establishment of a national religion will become apparent in the debates on the establishment clause, discussed *infra* in subsection 1. The vote of three-fourths or ten of the thirteen states required by article V of the United States Constitution for the adoption of an amendment would have been impossible to attain if the first amendment had been intended to disestablish the state churches of these five states.

[62] Virginia and North Carolina proposed identical amendments dealing with religion: "[N]o particular religious *sect* or *society* ought to be favored or established by law in preference to others." 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (2d ed. 1836) (emphasis added) [hereinafter cited as ELLIOT'S DEBATES] (Virginia, emphasis added); 4 *id.* at 244 (North Carolina). The

state, New Hampshire, where the Congregational Church was established, proposed an amendment to prevent the federal government from passing *any* law respecting religion.[63]

James Madison on June 8, 1789, after reworking these amendments, submitted the following amendment to the First Congress for its consideration: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall *any national religion* be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." [64]

1. *Congressional Debates on the Establishment Clause.*

A week after Congress passed the Northwest Ordinance, encouraging the teaching of religion and morality in the schools of the Northwest Territory, it began debate on the establishment clause. The debate makes it quite clear that the establishment clause was intended only to prohibit establishment of a national church.

Professor Michael Malbin (22a) notes the importance of the article "an" prior to "establishment of religion" in the amendment's final version:

> Had the framers prohibited "*the* establishment of religion," which would have emphasized the ge-

resolution of the Rhode Island Convention echoed Virginia's, 1 *id.* at 334.

The New York Convention demanded that "no religious *sect* or *society* . . . be favored or established by law in preference to others." 1 *id.* at 328 (emphasis added). Although Maryland's Convention offered no official demands for amendments, a proposed amendment read: "That there be no National Religion established by law; but that all persons be equally entitled to protection in their religious liberty." 2 *id.* at 553. *See* CORD *supra* note 12, at 6, 11. (T. 524)

[63] New Hampshire's ratifying convention proposed that "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ELLIOT'S DEBATES, *supra* note 62, at 326.

[64] 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added). (7a)

neric word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "*an establishment*" over "the establishment," they were showing that they wanted to *prohibit only those official activities that tended to promote the interests of one or another particular sect.*

Thus, through the choice of "an" over "the," conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the *Northwest Ordinance* of 1787, which Congress reenacted in 1789. . . .[65]

As will be seen in the following summary of the debates, several representatives feared that the clause "no religion shall be established by law" (as proposed by the select committee on July 28, 1789) might be interpreted as hostile toward all religion. (8a) The response of James Madison and other members of the House assured these individuals that the sole purpose of the amendment was to prevent establishment of a national religion which would interfere with the state religious establishments. (Madison altered his views a decade later.)

Peter Sylvester, a lawyer from New York, opened the debate by indicating his displeasure with the select committee's version because he feared the words could be construed "to have a tendency to *abolish religion altogether.*"[66] (11a) New York's proposed amendment pro-

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[65] M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-15 (1978) (emphasis added), cited by R. CORD, *supra* note 12, at 11-12. Malbin's chapter *The Establishment Clause* is included in full in the Appendix to this brief commencing at 1a.

[66] 1 ANNALS OF CONG. 729 (J. Gales ed. 1789) (emphasis added). *See also* ANTIEAU, DOWNEY, & ROBERTS, *supra* note 28, at 123-42. Professor Michael Malbin, *supra* note 65, at 7, suggests that Sylvester had two premises in mind as he spoke (11a):

(1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church schools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival.

vided only that "no religious *sect* or *society* . . . be favored or established by law in preference to others."[67]

Massachusetts' anti-Federalist leader, Elbridge Gerry, proposed that the amendment be reworded to read "no religious *doctrine* shall be established by law," which would have permitted such federal aid to religion in general as that of the Northwest Ordinance.[68] (12a) Massachusetts' constitution of 1789 provided that Protestant religious teachers in public schools could be paid from state tax funds to instruct in "piety, religion and morality."[69]

Roger Sherman, staunch Federalist from Connecticut, stated that he saw no need for an amendment, since the federal government had no authority to deal with religion.[70] (12a)

However, Federalist Daniel Carroll of Maryland favored the amendment because "many sects ha[d] concurred in opinion that they [were] not well secured under the present constitution." He believed that the amendment would "tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed."[71] (13a) His state's

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[67] 1 ELLIOT'S DEBATES, *supra* note 62, at 328 (emphasis added).

[68] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). As pointed out by Rep. Gerry later in the debate, the Federalists favored ratifying the Constitution as it was while the anti-Federalists wanted amendments before ratification. *Id.* at 731.

[69] MASS. CONST. of 1780, Pt. I, art. III (1780).

[70] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789). Connecticut also had established the Congregational Church.

[71] *Id.* Malbin believes these remarks were directed to the anti-Federalists.

constitutional proposal was almost identical to Madison's original draft.[72]

Madison responded that "he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," for some states were of the opinion that Congress might "establish *a national* religion" and had therefore required the amendment.[73] (13a)

Benjamin Huntingdon of Connecticut, protecting his state's established church, agreed with Rep. Sylvester that the words "no religion shall be established by law" might be taken in such latitude as to be extremely hurtful to the cause of religion." (14a) In particular he feared that the federal courts would not enforce a state law which required that citizens pay taxes to support ministers and build meeting houses. Although he favored Rhode Island's prohibition of the establishment of a religion, he did not want the amendment to be worded in a way "to patronize those who professed no religion at all." [74]

Madison then suggested a return to the language of June 8th by adding the word "national" before "religion," for "the people feared one *sect* might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." [75] (14a) Madison's decade-later interpretation should be

[72] 2 ELLIOT'S DEBATES, *supra* note 62, at 553.

[73] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). This sentence was quoted by Justice Reed, dissenting, in *McCollum v. Bd. of Educ.*, 333 U.S. 203, 244 (1948), to support his conclusion that "[t]he phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church." Justice Reed believed that Madison "by no means interpreted it to inhibit Congress from encouraging religion," according to F. O'Brien. F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 132 (1958).

[74] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789).

[75] *Id.* (emphasis added).

reviewed in light of his contemporaneous statements about the establishment clause.

Samuel Livermore of New Hampshire, reflecting strong anti-Federalist sentiment, objected to the word "national," and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience." [76] By the word "touching" Livermore apparently intended to prohibit any federal interference with the established Congregational Church of his state. (15a)

After further opposition to the word "national" from staunch anti-Federalist Elbridge Gerry of Massachusetts, who had earlier proposed the words "religious doctrine" over "national religion," Madison withdrew his motion for insertion of the word "national" before "religion." He insisted, however, on making his point clear by observing that the words "no national religion shall be established by law" did not imply that the government was a national one.[77] Then Livermore's motion passed 31 to 20. (15a-17a)

The House was divided between the Federalists (who did not feel any amendments to the Constitution were necessary) and the anti-Federalists (who did not want any reference to a "national" government or religion in the clause and insisted on amendments to the Constitution before it was ratified).[78] The House was also split between the states that wanted to protect their established churches from the federal government and those that wanted to prevent the establishment of a national church. However, it is clear from the debates that Congressmen from states with established churches (Connecticut and Massachusetts) and those without (New York) agreed that a narrow meaning be given to the

[76] *Id.* at 731 (emphasis added).

[77] *Id.*

[78] *See* remarks of Rep. Gerry, *id.*

establishment clause so that it would not prove to be hostile toward all religion, as this Court recently held in *Lynch v. Donnelly*, 104 S.Ct. at 1359.

After further debate the House adopted a slightly different version on August 21, 1789, restoring the words "establishing religion," which was then reported to the Senate.[79] (17a)

Although the Senate debates of September 3 and 9, 1789, were kept secret, five versions considered by that body prohibited Congress from making any law "establishing one religious *sect* or *society* in preference to others" (accepted and then amended), "establishing any religious sect or society" (defeated), "establishing any particular denomination of religion in preference to another" (defeated), "establishing religion" (accepted and then amended), and finally, as sent back to the House, "establishing *articles of faith* or a *mode of worship*." [80] (19a-20a)

The Senate's version was referred to a conference committee on which Madison and Sherman sat.[81] The compromise "Congress shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof" was submitted to first the House, then the Senate, and subsequently approved, respectively, on September 24 and 25, 1789.[82]

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[79] 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 107 (1789). "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[80] 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 70, 77 (emphasis added) [hereinafter cited as SENATE J.].

[81] Also, on September 7, 1789, the Senate defeated an amendment that would have prohibited the *states* from infringing on the rights of conscience. *Id.* at 72.

[82] 1 ANNALS OF CONG. 913 (J. Gales ed. 1789) and 1 SENATE J. 88 (1789) (emphasis added).

The Senate's approval of the words "one religious sect or society" and "articles of faith or a mode of worship" indicates that it did not intend that the federal government be prohibited from aiding all religion. (18a-20a) Instead, the phrase "*an* establishment of religion" in the final version indicates that Congress simply intended to prevent the establishment of a national religious sect or denomination, as confirmed by Madsion during the debates. This narrow reading of the establishment clause is confirmed by the debates of the state legislatures which subsequently ratified it and by Congress' contemporaneous passage of the Northwest Ordinance and the Prayer Day Resolution.

2. *State Ratification of the Establishment Clause.*

In 1785, Virginia had refused to permit state tax money to be used to support teachers of religion.[83] In 1787, its constitutional convention had ratified the federal Constitution with a proposed amendment guaranteeing "that no particular religious sect or society ought to be favored or established, by law, in preference to others." [84]

When the Bill of Rights was submitted to the Virginia legislature for ratification in the fall of 1789, many feared that the language did not adequately restrict the federal government. After adoption by the House of Delegates on November 30, 1789, the Senate postponed ratification until December 15, 1791. A statement signed by six members of the majority in the Senate may explain the two-year delay:

> The [First] Amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and *although it goes to restrain Congress from passing laws establishing any national religion*, they might, notwithstanding *levy taxes to any amount, for the support of religion or*

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[83] *See Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947).

[84] 3 ELLIOTT'S DEBATES, *supra* note 62, at 659.

> *its preachers*; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as it was established as the national religion of the country.[85]

The Senators apparently feared that the federal Congress would advance all religion or appropriate tax money for the benefit of all denominations, as had been proposed and rejected in Virginia's schools in 1785. The First Congress' re-enactment of the Northwest Ordinance shows that their fears were well grounded, for this act granted federal land for religious purposes and to schools that teach religion and morality.

The fact that none of the other states objected to the wording of the establishment clause or to the First Congress' passage of the Northwest Ordinance indicates that Virginia was clearly in a minority in its views, something which this Court has often overlooked.[86]

In fact, the citizens of North Carolina apparently approved of the practice. Reverend Nicholas Collins, in an article published during the debates in the North Caroline legislature, noted how a multiplicity of sects would prevent an establishment and advocated that every state and the federal government in the territories should provide a system of education "with sensible teachers, who shall instruct their pupils in the capital principles of religion, which are generally received, such as the being and attributes of God, his rewards and judgments, a future state, etc."[87] The Northwest Ordinance, whose

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[85] JOURNAL OF THE VIRGINIA SENATE 51 (1789) (emphasis added).

[86] For an exhaustive study of the state legislative debates on the establishment clause, *see* ANTIEAU, DOWNEY & ROBERTS, *supra* note 28, at 143-58.

[87] Fayettville Gazette, Sept. 14, 21; October 12, 1789. This article was also widely circulated in an influential magazine, 5 THE AMERICAN MUSEUM 303 (October 1789), after being published in the New York newspapers in June 1789. ANTIEAU,

history and impact were discussed earlier, fulfilled Collins' desires for inclusion of religion in the curriculum in schools under federal control.

C. The Establishment Clause Forbids the "Hostility" and "Callous Indifference" toward Religion that Would Be Shown by Barring a Moment for Individual Silent Prayer or Meditation, and Instead Allows the "Accommodation" and "Benevolent Neutrality" toward Religion that Is Shown by Sustaining a Moment of Silence.

The Alabama statute accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected, permitting the government to assume the role of benevolent neutrality. This protection of the right of teachers to call for a moment of silence for permissive prayer or meditation is not an establishment of a national church.

This Court recently held in *Lynch*:

> [The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Est blishment Clause. *Zorach*, *supra*, 343 U.S. at, 314, .2 S.Ct. at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum*, *supra*, 333 U.S., at 211-212, 68 S.Ct., at 465.

DOWNEY, & ROBERTS, *supra* note 28, at 157 add: "[w]hen this statement is considered in relation to the events in the first convention, it is apparent the citizens of North Carolina did not intend to embody a revolutionary principle in the First Amendment which would strip the federal government of power to recognize the need of her religious citizens."

Lynch v. Donnelly, 104 S.Ct. at 1359. "To hold that [the government] may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." [88]

Judge Roney, dissenting with three other judges from the denial of the Petition for Rehearing in this case by the Eleventh Circuit, agreed with First Circuit Chief Judge Coffin and District Judges Murray and Skinner in *Gaines v. Anderson*, 421 F. Supp. 337, 343 (D. Mass. 1976), that a statute which requires a period of silence for prayer or meditation "accommodate[s] students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters." [89] (JS 3b)

This Court held in *Marsh* that "to invoke Divine guidance on a public body . . . is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 103 S.Ct. at 3336.[90]

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[88] *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

[89] The court cites a number of the nation's leading constitutional scholars who believe that moments of silence may be permissible: L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 829 (1978); P. FREUND, RELIGION AND THE PUBLIC SCHOOLS: THE LEGAL ISSUE 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1041 (1963). The *Gaines* case was relied on by the court in *Jaffree v. Wallace*, 713 F.2d at 614. (JS 3b) Justice Brennan, concurring in *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 & n. 57 (1963), suggested that "the observance of a moment of reverent silence at the opening of class" would likely meet the test of constitutionality. *See also Reed v. Van Hoven*, 237 F. Supp. 48, 56 (D. Mich. 1965).

[90] *See also Mueller v. Allen*, 103 S.Ct. 3062 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from

Certainly in light of the contemporaneous acts of Congress with respect to public schools examined in the previous sections, the Founding Fathers would draw no distinction between a state legislature's verbal prayers (held constitutional in *Marsh*) and a school child's silent prayers or meditation. Neither would be considered the establishment of a national church or of religion in any form.

As Justice Brennan has noted, "even when the government is not compelled to do so by the free exercise clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh v. Chambers*, 103 S.Ct. at 3346. *Accord, Walz v. Tax Comm'n*, 397 U.S. at 673.

However, the notion of accommodation does not require leveling of all religious beliefs. The founders of America intended that believers in God from different denominations be accommodated by the federal government vis-a-vis one another, not that the government be required to give non-believers equal treatment with believers.[91] This Court has omitted an important part of

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unemployment taxes); *Gillette v. United States*, 401 U.S. 437 (1971) (exemptions from compulsory military service for religious objectors); *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations); *Arlans Dep't Store, Inc. v. Ky.*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of Sabbatarians); *McGowan v. Md.*, 366 U.S. 420 (Sunday closing laws); *Zorach v. Clauson*, 343 U.S. 306 (off-premises public school release time programs); and *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down prohibition on religious group meetings on public university campus); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down prohibition on service by ministers as delegates to state constitutional convention).

[91] James Madison and the Virginia constitutional ratifying convention defined religion as "the duty we owe to our Creator, and the manner of discharging it." 3 ELLIOTT'S DEBATES *supra* note 62, at 659. *See also* article 16 of the Virginia Bill of Rights, June

Justice Story's statement when it quotes him in *Lynch v. Donnelly*, 104 S.Ct. at 1361:

> The real object of the amendment was *not to countenance, much less to advance, Mahometanism* [*sic*], *or Judaism, or infidelity by prostrating Christianity; but to exclude all rivalry among Christian sects, and* to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. . . .[92] (T. 530)

Justice Story explained the public attitude that gave rise to the first amendment as follows:

> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to *receive encouragement from the state* so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to *level all religions*, and to make it a matter of state policy to hold all in *utter indifference*, would have created *universal disapprobation*, if not *universal indignation*. . . .[93]

In view of the language, intent, and history of the establishment clause and contemporaneous acts of the First Congress and subsequent Congresses, Appellants Smith petition this Court to find that a moment for individual silent prayer or meditation was constitutional in schools supported by federal aid during the early congressional period and is now constitutional in public schools.

12, 1776, *reprinted in* C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 62 (1900).

[92] 3 STORY'S COMMENTARIES, *supra* note 56, § 1871, at 728 (portions omitted from *Lynch* are underlined).

[93] 3 STORY'S COMMENTARIES, *supra* note 56, § 1868, at 726 (emphasis added).

D. The Establishment Clause Was Never Applied to the States, Other than by Judicial Error, as Demonstrated by the Language, Intent, and History of the Fourteenth Amendment.

The establishment clause did not apply to the states initially, as the language of the clause ("Congress . . ."), early Supreme Court decisions, and historical practice indicate. *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845). Five states had established churches when the first amendment was drafted in 1789, and these states made certain that the establishment clause was never applied to the states (amendments to the Constitution required a three-fourths majority of the states).

The fourteenth amendment did not apply the establishment clause to the states as the clear record of the congressional and state debates shows. Professor Raoul Berger of Harvard Law School, on whom the U.S. district court judge relied, reached this conclusion in his scholarly study entitled GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody. . . .[94]

Berger's conclusion was the result of 431 pages of detailed discussion with many hundreds of footnotes. The court below also relied on a scholarly article by Professor Charles Fairman, then of Stanford Law School, entitled: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*[95] The same conclusion has been

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[94] R. BERGER *supra* note 12 at 407, cited in *Jaffree v. Bd. of School Comm'rs.*, 554 F. Supp. at 1120-22 (JS 31d-35d).

[95] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1119 (JS 29d). *See also* H. MEYER,

reached by numerous other scholars.[96]

In their Jurisdictional Statement, Appellants Smith set forth at pages 11-21 reasons why the establishment clause did not apply to the states. These reasons are summarized as follows: (1) The purpose of the fourteenth amendment was to limit the power of the states only when they failed to provide due process of law or equal protection of the law to their citizens. (2) The debates of the 39th Congress on the version of the fourteenth amendment finally adopted and the debates of the state legislatures which ratified it do not contain a single reference to the establishment clause or the establishment of religion.[97] (3) State and federal Supreme Court decisions rendered immediately after the adoption of the fourteenth amendment show conclusively that no court believed that either the establishment clause or other portions of the first eight amendments were applicable to the states. (4) The reliance of Justice Black in his dissent in *Adamson v. California*, 332 U.S. 46, 115 (1947) on the remark of Rep. Bingham in 1871, five years after the congressional debates, that the first eight amendments did apply to the states has been seriously challenged by Professor

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THE HISTORY AND MAKING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT (1977), excerpts from which were introduced into evidence as Defendant-Intervenors' Exhibit 15.

[96] An impressive number of scholars have also written in support of the Fairman view and in opposition to Justice Black's extension of the establishment clause to the states. *E.g.*, M. HOWE, THE GARDEN AND THE WILDERNESS 22-33 (1965); W. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS (1964); Katz, *The Case for Religious Liberty*, in J. COGLEY, RELIGION IN AMERICA 101 (1958); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371; and J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 10 (1949). *But see*, Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

[97] Professor James McClellan, constitutional expert for appellants, testified that the issue of application of the establishment clause to the states "was not even debated when the fourteenth amendment was prepared and drafted [by] Congress." (T. 544-45)

Bernard Schwartz in his STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS. Schwartz notes that Bingham's 1871 speech was not adopted by Congress, but was a proposal to it for future actions to be taken.[98] (5) Congressional debates on the Blaine Amendment show that Representatives and Senators who participated in the debates on the fourteenth amendment just seven years earlier did not believe that the establishment clause was applied to the states. (T. 546-47)[99]

This Court's decision that silent individual prayer and meditation is constitutional may rest on either a careful reading of establishment clause history or on re-examination of application of this clause to the states through the fourteenth amendment. Appellants Smith urge this Court to re-evaluate the language, intent, and contemporaneous history of both the the first and fourteenth amendments in order to redress the grievous interference with their free exercise of religion in this case. Much of this interference has been brought about by this Court's thrusting itself into the role of sole arbiter of state establishment disputes which the drafters of these amendments intended to be left to the states to decide under their own constitutions and religious convictions. Should this Court find that recent but erroneous reliance on precedents violates the meaning, intent, and history of the first and fourteenth amendments, then the Court should find, as Justice Holmes did, that the error is "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-33 (1928), quoted

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[98] B. SCHWARTZ, I STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 294, 306-07 (1970): "Never in the 1866 debates did Bingham refer specifically to the now claimed incorporation of the Bill of Rights in the new amendment. . . ."

[99] *See* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

in *Erie v. Tompkins*, 304 U.S. 64, 79 (1938) (per Brandeis, J.).[100]

CONCLUSION

Considerable evidence was presented to the trial court in an adversarial context in this case which was not available to the Supreme Court when it passed upon the meaning of the establishment clause and its applicability to the states in *Everson*, *Engel*, and *Abington*:

> (1) Testimony and research showing how rivalry between the former colonies and fear of a national religious establishment caused the First Congress to prohibit the federal government from promoting a single religious sect or denomination while not intending thereby to show hostility toward religion. "The real object to the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." [101]
>
> (2) An extensive study of federal financial projects such as the Northwest Ordinance which advanced religion in public education during the early constitutional period—projects which were approved by both Jefferson and Madison.[102] "[N]ondiscriminatory or indirect aid to religion or to religious institutions was [not] to come under the ban of the First Amendment . . . ," according to the exhaustive research of Professor Cord.[103]

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[100] This Court in *Erie* relied on "recent historical research by a competent scholar" in overruling almost 100 years of judicial assumption of power. *Erie v. Tompkins*, 304 U.S. 64, 72-73 (1938).

[101] *Lynch v. Donnelly*, 104 S.Ct. at 1361. *Accord* T. 530-32. The expert testimony of Professor James McClellan was expanded on by his article, *The Making and the Unmaking of the Establishment Clause*, *supra* note 12. *See also* R. CORD, *supra* note 12, at 3-15 with M. MALBIN, *supra* note 65, at 1-17 (1a-27a), quoted extensively by Cord.

[102] R. CORD, *supra* note 12 (Defendant-Intervenors' Exhibit 14, copies of which have been lodged with the Office of the Clerk for the convenience of this Court and excerpts from which are contained in the Appendix at 1b.)

[103] R. CORD, *supra* note 12, at 50.

> (3) Extensive evidence on the erroneous application of the establishment clause to the states through the fourteenth amendment.[104]

If the First Congress which passed the first amendment could set aside federal lands for public schools to teach religion and morality and then mandate a national day of prayer which was apparently to be observed by adults and school children alike, then the lesser activity of observing a moment of silence for individual prayer or meditation is certainly constitutional. This conclusion is inescapable under the historic view as an accommodation of religion and speech.

As this Court states in *Lynch v. Donnelly*, 104 S.Ct. at 1359, "[This Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Holding a period of silence for individual prayer or meditation constitutional is consistent with prior holdings of this Court which permitted beneficial aid to religion.[105]

Prior decisions of lower courts which have sought to apply this Court's decisions have had a chilling effect on the prayers of students and teachers.[106] Although perhaps unintended by this Court or lower courts, such rulings

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[104] *See* R. BERGER, *supra* note 12, cited with approval by the court below, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1122, and H. MEYER, *supra* note 95. *See also* Jurisdictional Statement of Appellants Smith at pages 11-21.

[105] *See* cases cited in *Lynch*, 104 S.Ct. at 1363.

[106] *Stein v. Oshinsky*, 348 F.2d 999, 1002 (1965) required parents of kindergarten children to "content themselves with having their children say [their] prayers before nine or after three." The court below held that the establishment clause prohibited "any government involvement with religion" (JS 8a) and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation," (JS 18a) *Jaffree v. Wallace*, 705 F.2d at 1531, 1536.

seem to interfere with the authority of God over prayer.[107]

The 624 teachers, parents and students who are Appellants Smith petition this honorable Court (1) to examine the historical evidence presented for the first time to the trial court below by the adversarial system, (2) to restore the original intent of the establishment clause by permitting the observance of a moment of silence for meditation or permissible prayer, and (3) to return such matters of state law to the state courts to decide under their own constitutions, thus affirming the conclusions of the trial court below.

Respectfully submitted,

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[107] Justice Douglas, dissenting in *McGowan v. Maryland*, 366 U.S. 420, 562 (1961), acknowledged this higher authority, citing the Declaration of Independence:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

James Madison expressed the same sentiment before the Virginia Constitutional Ratifying Convention on June 12, 1788: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." S. PADOVER, THE COMPLETE MADSION 306 (1953).

APPENDIX

APPENDIX

RELIGION AND POLITICS

The Intentions of the Authors of the First Amendment

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Washington, D.C.

1978

CONTENTS

1 THE ESTABLISHMENT CLAUSE

A great deal has been written about the original meaning of the establishment of religion clause, much more than has been written about free exercise. But for all of this writing, nobody has tried to interpret the debates in the First Congress on a speech-by-speech basis.

One reason for this reluctance to look into the legislative history has to do with the sources available to the scholar. It always has been known that the *Annals of Congress*, by far the most complete records of the debate available, is taken from the shorthand notes of a reporter, Thomas Lloyd, who compiled them for private sale. Because there were no verbatim or official notes of those early congressional debates, most historians have been reluctant to lean too heavily on them for their interpretations.

Recent archival work has made it possible for the student of the religion clauses to use the *Annals* with much greater confidence than might have been felt in the past. The First Congress Project at George Washington University, sponsored by the National Archives, has been collecting a massive amount of material in preparation for what it expects to be the definitive multivolume documentary history of the First Congress.[1] While the same cannot be said for all of the clauses in the Bill of Rights, nothing collected by the First Congress Project suggests any reason for dissatisfaction with the *Annals* on the religion clauses. Lloyd may not have recorded every word of every speech, but at no point do the other

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[1] The project director is Professor Linda Grant DePauw. The first of a projected seventeen volumes was: *Documentary History of the First Federal Congress of the United States of America, Vol. 1: Senate Legislative Journal* (Baltimore and London: Johns Hopkins University Press, 1972). I should like to thank the project's two assistant editors, Charlene B. Bickford and Lavonne M. Hoffman, for their assistan-

accounts of the debates add new information to the *Annals* or alter what was in them.

Lloyd's notes tell us that the members of the First Congress did not intend the establishment clause to mean anything remotely resembling what the Supreme Court has been saying it means, at least since 1947. Some of the justices in recent years appear to have recognized that the Court's rulings have not been based on a proper reading of 1789 history.[2] But the justices have not replaced the earlier misreadings of history with an alternative interpretation. Instead, they have been acting almost as if their recognition of their predecessors' historical errors have liberated them from the need to consider what purposes the members of the First Congress may have meant the religion clauses to serve.

The turning point in the recent history of the establishment clause was the 1947 parochial school busing case of *Everson* v. *Board of Education*.[3] In the opinion written for the Court by Hugo Black, the Court announced a rule of law, endorsed by dissenters as well as by the five-justice majority:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[4]

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[2] See, for example, Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L.ed.2d 697 (1970), where Chief Justice Burger refers favorably to C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964), p. 6, note 9, without adopting their affirmative thesis.

[3] 330 U.S. 1, 67 S. Ct. 504, 91 L.ed. 711 (1947).

[4] 330 U.S. 1, 15.

There were two key elements in this rule. (1) The Court said that Congress cannot give nondiscriminatory aid to religion. There never was any question that the clause prohibited Congress from preferring one religion or group of religions over another, but this was the first time the Supreme Court took the additional step of prohibiting non-preferential aid to religion as such. (2) The other key element in the *Everson* rule was its effect on the states. For the first time, the Court said that whatever Congress could not do, the states could not do either.

The *Everson* Court claimed that it based its reading of the establishment clause on the intentions of the people in the First Congress.[5] Later, the Court led by Chief Justice Earl Warren reiterated this historical assertion in opinions endorsing the *Everson* rule.[6] While a number of legal scholars have supported *Everson's* reading of history,[7] the reading has not gone unchallenged. An impressive number of scholars has written in opposition to either the no-aid rule[8] or the extension of the establish-

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[5] 330 U.S. 1, 13.

[6] McGowan v. Maryland, 366 U.S. 420, 440-41, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961); Engel v. Vitale, 370 U.S. 421, 425, 82 S. Ct. 1261, 8 L.ed.2d 601 (1962); Abington School District v. Schempp, 374 U.S. 203, 213-14, 83 S. Ct. 1560, 10 L.ed.2d 844 (1963).

[7] Robert G. Dixon, "Religion, Schools and the Open Society," 13 *Journal of Public Law* 267, 278 (1964); Leonard Levy, *Judgments: Essays on American Constitutional History* (New York: Quadrangle, 1972) and "School Prayers and the Founding Fathers," *Commentary*, vol. 34 (September 1962), p. 225; Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), pp. 57-73.

[8] Antieau, Downey, and Roberts, *Freedom from Federal Establishment*; Edward S. Corwin, "The Supreme Court as a National School Board," 14 *Law and Contemporary Problems* 3 (1949); Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separatism" (Uupublished, 1969); Edward R. Norman, *The Conscience of State in North America* (London:

ment clause to the states,[9] but none has tried to interpret Lloyd's notes on a speech-by-speech basis. When we look at these notes carefully, we find that not one, but both, halves of the *Everson* rule fly in the face of the intended meaning of the establishment clause.

Amendments Proposed

The Constitution, as ratified, mentioned religion only once—in the Article VI clause prohibiting religious tests for national office. The delegates at the Philadelphia Convention thought that, since they were creating a government of limited powers, with no authority to act in matters relating to religion, no further protection was necessary. An extended, commercial republic, made up of people of all faiths, would never let the government impose a religious orthodoxy, as long as all kinds of people could be represented in the legislature.

This argument was not enough to satisfy many of those attending state ratifying conventions. Many of them were concerned that the federal government, using its constitutionally delegated powers, might pass laws indirectly affecting religion or other subjects previously reserved for the states. As a result, many of these ratifying conventions urged the national government to amend the Constitution as soon after ratification as possible. A few states specifically urged the inclusion of a

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Cambridge University Press, 1964); James M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949); Charles E. Rice, *The Supreme Court and Public Prayer* (New York: Fordham, 1964).

[9] Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), pp. 22-23; Wilbur Katz, *Religion and the American Constitutions* (Evanston, Ill.: Northwestern University Press, 1964) and "The Case for Religious Liberty," in Cogley, ed., *Religion in America*, p. 101; Lowenthal, "The Place of Religion," p. 19; O'Neill, *Religion and Education*, p. 10; Joseph Snee, "Religious Disestablishment and the Fourteenth Amendment," 1954 *Washington University Law Quarterly* 371.

bill of rights. Virginia and North Carolina proposed identical provisions dealing with religion:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[10]

New York offered a provision similar to these,[11] while New Hampshire suggested that "Congress shall make no laws touching religion or to infringe the rights of conscience."[12]

When James Madison reworked the many amendments suggested by the states into one set of proposals to be presented to the First Congress, he revised this religion amendment and added a new one not suggested by the states that would have limited state power. The two amendments were introduced by Madison to Congress on June 7, 1789.

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.[13]

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[10] J. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., 5 vols. (Washington, D.C., 1836), vol. 3, p. 659 (Virginia) and vol. 4, p. 1244 (North Carolina).

[11] Ibid., vol. 1, p. 328.

[12] Ibid., vol. 1, p. 362.

[13] 1 *Annals of Congress* 434 (June 8, 1789).

> No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.[14]

The language used in these amendments indicates that Madison wanted to prohibit both the states and the federal government from infringing on the rights of conscience. In contrast, the establishment clause was to apply only to the federal government.

Madison's proposed amendments were referred on June 7 to the Committee of the Whole House.[15] After they sat idle for a month and a half, they were referred on July 21 to a specially formed Select Committee, of which Madison was a member.[16]

The Select Committee acted fairly quickly, reporting to the House after one week, on July 28. The committee recommended the proposal to prohibit the states from violating the equal rights of conscience, and the House passed it after little debate and only a minor modification.[17] It also recommended an amended version of the proposal limiting congressional action, but, in contrast with the limitation on state action, this proposal was debated by the First Congress at greater length than almost any other item in the Bill of Rights.

The committee version of the limitation on congressional action, which was to be changed several times during the course of the debates over the Bill of Rights, read:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[18]

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[14] Ibid., p. 435.

[15] Ibid., p. 450.

[16] Ibid., p. 665.

[17] The House's rewording involved only a minor shift in grammar. 1 *Annals* 755.

[18] 1 *Annals* 729.

This committee version made two major changes from the original Madison proposal. First, the committee dropped the phrase "the Civil Rights of none shall be abridged on account of religious belief or worship." Since there was no committee report, any explanation of the meaning of this change must be conjectural. One plausible reason for the omission is that the phrase seems to be redundant, protecting nothing not covered either by Article VI of the original Constitution or by the other clauses of the proposed amendment.

The second committee change was the omission of the word "national" used in Madison's proposal, making the amendment read, "No religion shall be established by law." This change was more significant than the other one, but it would be best to defer an explanation of its meaning until the debate is analyzed.

Another two weeks passed between the July 28 filing of the Special Committee's report and the consideration of the Bill of Rights on the floor. In other words, more than two months elapsed between Madison's June 7 introduction of the amendments and the start of floor debate on August 15.

This waiting period may seem normal to a student of the modern Congress, who is used to seeing bills become lost in standing committees. But it was exceptional in the early Congresses, and, as the months wore on, the time element became an important factor in the political strategies of those interested in the amendments.

Anti-Federalists who had opposed the Constitution had used the lack of a bill of rights as an argument against ratification. Now, these same anti-Federalists hoped to stall the Bill of Rights and thus weaken support for the new Constitution. The tactic might have succeeded. There was a delay in assembling a quorum at the beginning of the First Congress and time was short.

Madison understood this tactic for what it was.[19] Once the amendments reached the floor, he acted forcefully to expedite debate and to arrange the compromises necessary to assure passage before adjournment.[20] Readers looking at the *Annals of Congress* for the first time have to bear this in mind as they read the Bill of Rights debate. Much of the character of the debate, as well as some specific features of the compromises made, derive directly from the tactical situation created by this time pressure.

The August 15 Debate

Debate on the Bill of Rights opened in the House on August 15, when the religion amendment received its principal consideration. The debate left many questions unanswered—one day was hardly sufficient for a matter as complex as religious disestablishment and toleration. But one day was more than the Congress spent on most other items in the Bill of Rights. After the pressure of time had become more obvious, the members accepted some of the clauses, including the free exercise clause, with little or no debate.

The August 15 speeches concentrated on the establishment question, bypassing the "rights of conscience" or

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[19] James Madison, *The Writings of James Madison*, Gaillard Hunt, ed., 9 vols. (New York: Putnam, 1900-1910), vol. 5, p. 335.

[20] See, for example, Madison to Edmund Randolph, August 21, 1789, ibid., vol. 5, pp. 417-18. A similar point about the delaying tactics of the opposition was made in a letter from John Brown to William Irvine, August 17, 1789. The letter is held in the Caryl Roberts Collection of the Irvine Papers, Historical Society of Pennsylvania. Brown wrote, "the Antis, viz, Gerry, Tucker, etc., appear determined to obstruct and embarass the business as much as possible." A similar picture of Gerry and Tucker's motives appears in a letter dated August 18, 1789, from Frederick A. Muehlenberg to Benjamin A. Rush. Copies of both letters are available in the files of the First Congress Project.

"free exercise" clause almost completely.[21] Peter Sylvester, a fifty-year-old lawyer from New York who served on the Committee of Safety in 1774, opened the debate.

Sylvester's speech indicated that he was unhappy with the language in the Select Committee's version of the establishment clause. His objection, he said, was that the particular words used could lend themselves to an unintended construction. In particular, he feared that the clause "might be thought to have a tendency to abolish religion altogether." [22]

Sylvester's objection seems a strange one. Readers trying to make sense of the debates have to ask themselves how anyone ever could think that an amendment reading "no religion shall be established by law" could be dangerous for religion. Unfortunately, Sylvester never explained his reasons.

What seems likely is that Sylvester had two premises in mind as he spoke: (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church shools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival. Unless these premises are assumed, it is difficult to see how Sylvester could have seen the establishment clause as a threat to religion.

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[21] The entire debate may be found at 1 *Annals* 729-31, and is reproduced in Stokes, *Church and State*, vol. 1, pp. 541-43. Unfortunately, there seems to be some variation in the pagination of different prints of the *Annals*. In a footnote, Stokes refers to this debate as occurring on pp. 757-59, and this author has seen other numberings as well. The numbers given here seem to be the most common. Any researcher having trouble using the *Annals*, however, would be best advised to rely on dates rather than page numbers.

[22] 1 *Annals* 729.

This reading of Sylvester's statement obviously supports this author's view of the historical meaning of the establishment clause. But as convenient as it is, it involves too many assumptions to be accepted without corroboration. It is necessary, therefore, to continue reading beyond the debate's first speech.

As we continue reading, however, we discover rapidly that something said by the Massachusetts anti-Federalists leader Elbridge Gerry supports this interpretation of Sylvester's remarks. Gerry spoke after Select Committee Chairman John Vining, of Delaware, who would have reversed the order of the "rights of conscience" and "establishment" clauses as a way of showing concern for the continued existence of religion. Gerry urged the Congress to reword the amendment to read "no religious doctrine shall be established by law."[23] The effect of this would have been to prohibit the most serious form of religious establishment, the proclamation of an official credo, without prohibiting all things that might conceivably be regarded as "aids" to religion.

What did Gerry's proposal have to do with the two speeches preceding his? Gerry apparently was responding to something, rather than starting the debate anew. Gerry may have been dissatisfied with Vining's response to Sylvester's criticism of the clause. Since Gerry's alternative language would have allowed some assistance to religion, that seems to confirm our earlier reading of Sylvester.

Roger Sherman, of Connecticut, was the fourth speaker whose remarks were recorded by Lloyd. Sherman reiterated the Federalist delegated-powers argument against having any bill of rights. Sherman said that he saw no need for an amendment, since the government had no authority to pass legislation dealing with religion. Daniel Carroll, the fifth speaker, disagreed with Sherman, not

[23] Ibid., p. 730.

because of his understanding of the powers delegated to the federal government, but because of the need for conciliating the anti-Federalists, who wanted amendments to quiet their fears about the new government's powers.

The next speaker was James Madison. Lloyd's summary of his speech reads:

> Mr. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish *a* national religion.[24]

Madison's response to Sherman in this speech is obvious and on the surface: whether the amendment really was needed or not—he privately agreed that it was not—some states wanted it. But there is another interesting aspect of this speech. In two places Madison misquoted his own proposal, adding a word to it by saying that Congress should not establish *a* religion. The additional word is significant. If it had been in the original, Sylvester would never have objected. If the added word had been in Madison's clause, it could not have been read as a prohibition of indirect, nondiscriminatory assistance to religion. To say that Congress should not establish *a* religion differs from saying it should not assist religion as such.

Benjamin Huntington, speaking after Madison, returned to this problem of the difference between the

[24] Ibid. [Emphasis added.]

clause's language and the intentions of the members of Congress. Huntington said that he agreed with Madison about what people wanted the amendment to say. In a phrase similar to Sylvester's, however, he expressed concern "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion," and he "hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[25] That is to say, Huntington thought the amendment should not require the government to be neutral to all differences between religion and irreligion.

Madison responded by suggesting that if the word "national" were added before the word "religion"—which would return the clause to the language he presented on June 28—the questions raised by both Sylvester and Huntington would be answered. He then indicated clearly that he accepted the Sylvester-Huntington view of what the clause should be saying, by stating its most important purpose in this way:

> Madison believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.[26]

Up to this point in the debate, everyone seemed agreed on what they wanted the amendment to say. The major disagreement was over the language reported by the committee, and whether it could be misconstrued to mean something other than what was intended. All of the

[25] Ibid., 730-31.

[26] Ibid., p. 731.

speakers, except Sherman, agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another. But every one of them also seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion, as long as the assistance is incidental to the performance of a power delegated to the government. Both Sylvester and Huntington thought that the failure to extend this kind of assistance would be the equivalent of active hostility to religion. Madison, even though he privately questioned the efficacy of governmental assistance to religion, accepted the Sylvester-Huntington view throughout the First Congress debates.

A new element was added to the debate immediately after Madison's speech urging the addition of the word "national." Samuel Livermore, of New Hampshire, objected to the rewording and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[27] This was the first statement in the debates which, if taken out of context, could conceivably be used to support the modern Supreme Court's "no aid to religion" interpretation of the establishment clause. But Livermore's silence on the agreement between Sylvester, Huntington, and Madison on indirect nondiscriminatory assistance suggests that what he wanted had little to do with the aid/no aid issue. This is confirmed by the character of the arguments used by Elbridge Gerry to support Livermore.

Gerry, speaking next, immediately connected Livermore's proposed language to Madison's use of the word "national." Gerry objected to Madison's choice of language because it implied that the Constitution created

[27] Ibid. [Emphasis added.]

one nation, with a national government, instead of a union of states ruled by a federal government with limited powers. He principally was concerned, in other words, with the symbolic importance of putting the word "national" in our fundamental legal document, a word which the 1787 Convention carefully left out of the original Constitution when referring to the government of the United States. Gerry's concern with the relationship between the federal and state governments, expressed here during the establishment clause debate, was a consistent theme raised by Gerry during the First Congress, as it had been during the Constitutional Convention.

The Select Committee's version of the establishment clause—with its deletion of the word "national" from Madison's original proposal—would have satisfied this objection of Gerry's, but the committee version was too ambiguous on other grounds. Gerry supported Livermore because Livermore went even further than the committee did toward satisfying Gerry's concern over the nation/state issue. Livermore's suggested prohibition of any federal law "touching" religion differed in two ways from the versions of the clause discussed until then. (1) Livermore's language apparently would have prohibited any form of federal aid to religion, including nondiscriminatory aid offered to achieve a properly delegated end. However, this would not have led to the destruction of religion that Sylvester and Huntington feared, because Livermore's language reaffirmed the power of the states to aid religion as they saw fit. (2) Indeed, state power would have been enhanced. The Federalist interpretation of "necessary and proper" was consistent with permitting federal laws to affect state establishments indirectly, as long as Congress was trying to achieve something it had the power to accomplish. Livermore would have prevented this, and thereby could have raised havoc with the powers of the new federal government. It was precisely for this reason that Gerry, ever watchful of the new government's power, supported Livermore.

Livermore and Gerry had struck a responsive chord, and Madison knew it. He spoke right after Gerry to deny that his insertion of the word "national" was meant to have any symbolic importance, and he withdrew his motion to include the word. But the damage to the Federalist position had been done, at least for that day. The Select Committee's language, which had been neutral on the nation/state issue, was defeated 31-20 by the anti-Federalist Livermore proposal.

The August 20 Reconsideration

The August 15 debate was the only one recorded on either of the religion clauses. But the conclusion of public debate did not put an end to the changes the members of the First Congress made in the wording of the amendment.

On August 20, Fisher Ames, of Massachusetts, suggested that the establishment clause should be returned to the Select Committee's version. His proposal also marked the first congressional appearance of the free exercise clause as we know it.

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[28]

If the interpretation given here of the Livermore amendment is correct, the Ames version of the establishment clause represented a return to a compromise position on the nation/state issue: while there were no claims that United States was one "nation," neither were there any positive assurances that Congress would not do anything that touched the state religious establishments. This compromise, however, was not to be the last word on the nation/state issue.

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[28] 1 *Annals* 766 (August 20, 1789).

Ames's addition of the free exercise clause obviously was important, but because the *Annals* do not report any speeches on the proposal, it is difficult to determine its meaning. What was the relationship between the "free exercise" and the "rights of conscience" clauses in Ames's proposal? Were they redundant? Was the phrase "free *exercise*" meant to suggest that something more than rights of conscience or belief were to be protected? If so, what did the word "exercise" mean? Since Madison did use the word "worship" in his first version of the religion clauses, did "exercise" refer to the utterance and expression of belief through worship? If so, was the idea of worship understood to be limited to traditional modes of public, congregational prayer, or were other forms of expressive activity and/or religiously motivated behavior to be protected as well? Without any legislative record it is impossible to answer these questions without referring to noncongressional contemporary sources. We shall turn to these later.

Although there was no floor debate on Ames's motion, there must have been considerable discussion of it off stage before it was introduced. The House accepted the motion of August 21, with no apparent controversy or counterproposal. On August 24, after some minor stylistic revision, the House sent the Ames's version to the Senate as its final version of the religion amendment.[29]

Senate Action

The principal Senate debate on the amendment apparently took place on September 3. We have to say "apparently" because Senate floor debates during the early Congresses were kept secret.

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[29] 1 *Annals* 779. For receipt by the Senate, see Journal of the First Session of the Senate, p. 60 (August 25, 1789). [Hereinafter cited as 1 S. Jour.]

The Ames amendment must have provoked controversy in the Senate, since several alternative versions were suggested in its place. The votes on these seem to have been close, because competing versions were passed and then defeated again in fairly rapid order. Unfortunately, the *Senate Journal* does not even give us vote divisions; all we are told is whether a given motion passed or was defeated.

The first substitute amendment to be offered in the Senate on September 3 read as follows:

> Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[30]

This version dropped the free exercise clause, while it made the establishment clause completely unambiguous on the permissibility of non-discriminatory aid. It was defeated at first, but then was accepted by the Senate after reconsideration. But that did not end the matter. After the Senate rejected a motion offered on that same day to eliminate the religion amendment entirely, it then rejected two versions of the amendment that were similar to the one they had just accepted. The two defeated amendments read:

> Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[31]

> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.[32]

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[30] Ibid., p. 70.

[31] Ibid.

[32] Ibid.

The parliamentary status of the version that had passed earlier in the day is left mysterious by the *Journal*. But whatever its status, the succession of amendments offered makes it clear that both the wording of the establishment clause and the very presence of the free exercise clause were being debated. The Senate ended the day by accepting most of the Ames version, after striking the seemingly redundant clause, "nor shall the equal rights of conscience be infringed." At the end of September 3, the Senate version of the amendment read:

> Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[33]

This did not satisfy some senators, who wanted to spell out the particular relationships between government and religion that they considered to be establishments. On September 9, the Senate embodied these concerns in the narrowest version of the amendment we have seen so far:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[34]

This was the religion amendment that the Senate sent back to the House.

The Meaning of the Final Language

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference.[35] The *Annals* do not give the House's reasons for rejecting the Senate's version of the religion amendment, but reasons come to mind readily. Madison's understanding of the kinds of

[33] Ibid.

[34] Ibid., p. 77 (September 9, 1789). The Senate defeated the amendment that would have prohibited the states from infringing on the rights of conscience. Ibid., p. 72 (September 7, 1789).

[35] Ibid., pp. 77-78.

governmental activities that should be prohibited was much broader than the understanding implied by the Senate amendment. At least part of Madison's broader conception was accepted by most members of the House.

The conference committee for the Bill of Rights was a strong one, composed of Representatives James Madison (Va.), Roger Sherman (Conn.), and John Vining (Del.), chairman of the House's Select Committee, and Senators Oliver Ellsworth (Conn.), Charles Carroll (Md.), and William Paterson (N.J.).[36] The House members seem to have had their way on the religion amendment. The version that came out of the conference was essentially the Ames version with one significant alteration:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The conference committee's language was accepted by the House on September 24,[37] and by the Senate on September 25.[38]

The final wording of the amendment embodied key compromises on both the nation/state and the aid/no aid issues, compromises which were made possible by the more important underlying agreement on the need to pass a bill of rights before time pressures made passage that year impossible. The most important compromise on the aid/no aid issue involved the use of the word "establishment" without such qualifying phrases as "religious doctrine" or "articles of faith." This formulation satisfied Madison's desire to prohibit indirect forms of discriminatory religious assistance as well as the direct establishment of a national church. At the same

[36] Stokes, *Church and State*, vol. 1, pp. 546-47.

[37] 1 *Annals* 913 (September 24, 1789).

[38] 1 S. Jour. 88 (September 25, 1789).

time, the phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

Thus, through the choice of "an" over "the," the conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: "Religion, morality, and knowledge," the clause read, "being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged."[39] This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools.

The conference committee's language indicates that, in addition to the problem of nondiscriminatory aid, committee members also were deeply concerned about the nation/state issue. This concern seems to have been reflected in the specific language they choose to insert, "no law *respecting* an establishment of religion."

Most commentators assume that the word "respecting" is synonymous with "tending toward." Thus, they read the clause as if it prohibits Congress from passing any law that tends to establish a religion. These commenta-

[39] 1 Stat. 50, 52 (1789), Art. III.

tors are only partly right. If this were all the conferees cared about, they could have handled the matter much more directly than they did. But what the conferees—or at least the House conferees—needed was language that would serve two purposes at once. To be sure, they wanted to prohibit laws that tended to establish a religion. But they also wanted language that would satisfy the nation/state concerns of such people as Elbridge Gerry and Samuel Livermore.

The language the conferees chose does serve both parts of this dual purpose. It not only prohibits laws which "tend to" establish a religion; it also prohibits Congress from passing laws" with respect to" an establishment of religion. In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states.[40] This was designed to satisfy people from states, such as Massachusetts, that did have established churches. The conference committee's version did not go as far on this point as the proposal offered in the House by Livermore and Gerry on August 15, and that may help to explain why both men finally voted against the amendment when it was accepted by the House on September 24 by a vote of 35-14.[41] But the conference version was a compromise between the Ames version of August 20 and the more anti-Federalist Livermore version. Since the Ames version originally represented a compromise between the more nationalist Madison version and the Livermore proposal, the final version apparently went more than halfway in a vain effort to win the support of the anti-Federalists.

Most scholars who have written on the establishment clause fail to see this dual purpose because they underestimate the importance of the nation/state issue for the

[40] Lowenthal noted the dual purpose of this language in "The Place of Religion," p. 19.

[41] 1 *Annals* 913 (September 24, 1789).

members of the First Congress. But, according to the only comprehensive study of that Congress written by a historian who used the First Congress Project's materials, federalism was *the* overriding issue throughout the Congress.[42] There should be no surprise, therefore, about its importance here.

Thus, the records available to us demonstrate that the establishment clause was meant to have two major purposes:

(1) It prohibited the federal government from giving any aid to religion if the aid in question could *tend to* establish *a* religion. This prohibition was broader than either Gerry's "no religious doctrine" or the Senate's "no religious sect or society" formulas, but it was not so broad as to forbid such forms of nondiscriminatory assistance to religion as were found in the Northwest Ordinance.

(2) At the same time, the clause prohibited Congress from tampering with the state religious establishments. This prohibition was not so broad as it would have been under Livermore's proposal but it represented a more explicit guarantee to the states than anything in Madison's original package of amendments.

There remains one more difficult problem of interpretation. The legislative history of the establishment clause shows that the framers accepted nondiscriminatory aid to religion. Yet many writers, knowing Madison wanted to prohibit even this much, have used Madison's views stated elsewhere to support a strict separationist position. If these other writers are correct about Madison (and we know he did oppose Virginia tax benefits distributed to all churches), what can explain his willingness to go along with something different in the First Congress? The answer is twofold.

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[42] Kenneth R. Bowling, *Politics in the First Congress, 1789-1791* (University of Wisconsin: Ph.D. diss., 1968).

(1) He needed the votes to defeat Gerry's attempts during the summer of 1789 to delay the Bill of Rights, and he needed the Bill of Rights to achieve what was to him a more important goal than the exact wording of the establishment clause—public support for the new Constitution.

(2) Madison felt all along the First Amendment was unnecessary. He thought a modern extended republic would breed such a multiplicity of sects as to make establishment unlikely even without an amendment. Once amendment became politically desirable, he was willing to accept nondiscriminatory aid instead of strict separation. But the aid would be circumscribed very narrowly. It had to be given in pursuit of a legislative end specified in the Constitution, and it could not discriminate among sects. Together, these requirements would produce practical results only slightly different from the ones that would flow from his preferred notion of separation. All that would be needed was a strict enforcement of nondiscrimination. Even in Madison's day, nondiscrimination would have required one to consider Jefferson's marginally Christian deism as a religion. Today, we also would have to include Muslims, Buddhists, and other sects outside the Judaeo-Christian tradition. Thus, the compromise he agreed to would have permitted aid to private schools but not any of the practices he thought dangerous.

What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they

all agreed that Article I gave Congress no direct power to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power. Sylvester and those who agreed with him feared that religion would be hurt if Congress were not allowed to prefer religion over irreligion in otherwise valid laws. Madison, in forms outside the First Congress, thought religion would flourish best if it were left alone, in a strict policy of separation. But he saw no harm in compromising with Sylvester, so he did.[43]

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[43] These strands have been overlooked in the current debate over establishment for reasons largely having to do with the federalism issue. Some current writers believe the Civil War and Fourteenth Amendments so transformed the nation/state issue as to make readings based on 1789 desires to accommodate the anti-Federalists irrelevant. There are two answers to this.

(1) Before one assumes that the Fourteenth Amendment prohibits any state aid to religious organizations, one should be aware that the generation that adopted it thought yet another amendment (the "Blaine Amendment") would have been needed to achieve this. The amendment was passed by the House on August 4, 1876, but fell short of the necessary two-thirds in the Senate. The version introduced in the Senate on August 14, 1876 said, in part: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. . . . No. . . . appropriation or loan of credit shall be made to any religious or anti-religious sect. . . . This article shall not be construed to prohibit the reading of the bible in any school or institution; and it shall not have the effect to impair the rights of property already vested." C. Moehlman, *The American Constitutions and Religion, Religious References in the Charters of the Thirteen Colonies and the Constitutions of the Forty-Eight States: A Sourcebook on Church and State in the United States* (Berne, Ind., 1938), p. 17.

(2) More important, suppose one adopts the post-1937 notion (in Palko v. Connecticut 302 U.S. 319, 58 S. Ct. 149, 82 L.ed. 288) that the concept of "ordered liberty" in the due process clause now requires the states to adhere to the establishment clause? Even so, one should not ignore the federalism portion of the original establishment clause, as the *Everson* Court did in 1947. Ignoring it affects the way one looks on the controversy over nondiscrimina-

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tory aid. If one tries to read the language in the establishment clause without its federalism context, a "no-aid" reading comes almost naturally. Understanding the federalism background helps clarify why the framers used the strange wording they did in a clause meant to permit nondiscriminatory aid.

SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION

ROBERT L. CORD
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Chapter One

THE GENESIS OF THE ESTABLISHMENT OF RELIGION CLAUSE

* * * *

From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

Chapter Two

RESURRECTING MADISON AND JEFFERSON

* * * *

The thesis advanced in chapter one concerning a narrower interpretation of the Establishment of Religion Clause of the First Amendment has been endorsed by a number of distinguished scholars. Besides James Madison, the State ratifiers of the Federal *Constitution*, Justice Joseph Story, and Thomas Cooley in the eighteenth and nineteenth centuries, to that list can be added the names of such noted twentieth-century constitutional scholars as Edward S. Corwin and Alexander Meiklejohn.[1] Corwin's article "The Supreme Court as National

[1] The late Edward S. Corwin was McCormick Professor of Jurisprudence, Princeton University, until his retirement in 1946. See

School Board," draws attention to J.M. O'Neill's book *Religion and Education Under the Constitution*,[2] which Corwin calls "a devastating assault upon the *McCollum* decision"—a 1948 U.S. Supreme Court decision discussed in detail in chapter five.[3] Indeed the O'Neill book is a devastating assault not only on *McCollum* but also on the broad interpretation given to the prohibition of the Establishment of Religion Clause by all the opinions in the *Everson* "Bus Case" of 1947[4]—the first case in which the United States Supreme Court advanced a comprehensive interpretation of the Establishment Clause.[5]

The meaning of the Establishment of Religion Clause developed in chapter one has been rejected as a narrow interpretation by the Supreme Court and by many prominent scholars, but none more pre-eminent in writing about the separation of Church and State, than Professor Leo Pfeffer, who has been referred to by the monthly periodical *Church and State* as "the country's leading legal expert on church-state questions. . . ."[6]

* * * *

his article, "The Supreme Court as National School Board," 14 *Law and Contemporary Problems* 3 (1949). The late Alexander Meiklejohn was most noted in the fields of logic, philosophy, and his writings on the First Amendment, among which were *Free Speech and Its Relation to Self-Government* (New York: Harper and Row, 1948), and "The First Amendment is an Absolute," Philip B. Kurland, ed., *The Supreme Court Review, 1961* (Chicago: University of Chicago Press, 1961), pp. 245-266. See his article, "Educational Cooperation between Church and State," 14 *Law and Contemporary Problems* 61 (1949).

[2] (New York: Harper Brothers, 1949). O'Neill's book was more recently reprinted without change, by Da Capo Press in 1972.

[3] Corwin, *Law and Contemporary Problems*, p. 14, fn. 44.

[4] *Everson v. Bd. of Education*, 330 U.S. 1 (1947).

[5] Because it is the precedent case interpreting the Establishment Clause, the major opinions in *Everson v. Bd. of Education* will be analyzed in chap. five.

[6] *Church and State*, Vol. 30, No. 10 (October 1977), p. 10 (202). It should be noted that Professor Pfeffer has written many books

In appraising what Madison believed was constitutional in matters of Church and State *when he was President*, it should be remembered that a request from Congress, by joint resolution, asking that a Presidential Proclamation be issued concerning a day of "Thanksgiving" and "Prayer" is a legislative act that is not binding on the President. If Congress had by law created a national holiday through appropriate constitutional legislative process—either with the President's concurrence or by overriding his veto—then presidential discretion would not have been involved. But in all of Madison's Thanksgiving Proclamations this was clearly not the case. In short, Madison as President received from Congress joint resolutions requesting the proclamations declaring the days of "Thanksgiving and Prayer" and on four separate occasions issued Presidential Proclamations which were *purely discretionary* executive acts. In no instance was he compelled by law to issue them. If Madison's heart—let alone his principles—had not been in his declaration of the days of "Thanksgiving," then the very texts of his presidential proclamations indict him as a man of little or no scruples on the matter. Consider Madison's Thanksgiving Day Proclamation of March 4, 1815:

By the President of the United States of America.

A Proclamation.

The Senate and House of Representatives of the United States have by a joint resolution signified their desire that a day may be recommended to be

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on American Constitutional Law, including *The Liberties of An American* (Boston: Beacon Press, 1956); *This Honorable Court* (Boston: Beacon Press, 1965); with Anson Phelps Stokes, *Church and State in the United States* (New York: Harper and Row, 1950); *God, Caesar, and The Constitution* (Boston: Beacon Press, 1975); and *Church, State, and Freedom* (Boston: Beacon Press, 1953). Pfeffer has also actively participated in the litigation of more than one half of all the Establishment Clause cases decided by the United States Supreme Court since the *Everson* Case of 1947.

observed by the people of the United States *with religious solemnity as a day of thanksgiving and of devout acknowledgements of Almight God for His great goodness* manifested in restoring to them the blessing of peace.

No people ought to feel greater obligations *to celebrate the goodness of the Great Disposer of Events* and of the Destiny of Nations than the people of the United States. *His kind providence* originally conducted them to one of the best portions of the dwelling place allotted for the great family of the human race. *He protected and cherished them* under all the difficulties and trials to which they were exposed in their early days. *Under His fostering care* their habits, their sentiments, and their pursuits prepared them for a transition in due time to a state of independence and self-government. In the arduous struggle by which it was attained they were distinguished by multiplied tokens of *His benign interposition.* During the interval which succeeded He reared them into the strength and endowed them with the resources which have enabled them to assert their national rights and to enhance their national character in another arduous conflict, which is now so happily terminated by a peace and reconciliation with those who have been our enemies. *And to the same Divine Author of Every Good and Perfect Gift we are indebted for all those privileges and advantages, religious as well as civil, which are so richly enjoyed in this favored land.*

It is for blessings such as these, and more especially for the restoration of the blessing of peace, that I now recommend that the second Thursday in April next be set apart as a day on which the people of every religious denomination may in their solemn assemblies unite their hearts and their voices in a freewill offering *to their Heavenly Benefactor of*

their homage of thanksgiving and of their songs of praise.

Given at the city of Washington on the 4th day of March, A.D. 1815, and of the Independence of the United States the thirty-ninth.

JAMES MADISON [63]

The actions of Madison in the House of Representatives and the White House and some of his private correspondence upon leaving the Presidency, in comparison with the statements in the "Detached Memoranda," suggest that in his discussion of monopolies—the central theme of the "Memoranda" [64]—Madison out of office and as an old man regretted some of his past public actions.

Whereas Pfeffer rests his argument about chaplains in Congress and Thanksgiving Proclamations on one document written in Madison's declining years, I think that Madison should be judged on his behavior, statements, and actions *while he was a public servant in the House and in the Presidency making policy and accountable for it.* An analogous contemporary illustration should make my point. If former President Nixon, reflecting on his tenure as President, in his final years were to publish a book in which he unequivocally wrote that: "Taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right of privacy," then in my judgment, it would be absurd—for any future biographer or

[63] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897,* Vol. I (Washington, D.C.: Bureau of National Literature and Art, 1901), pp. 560-61. Emphasis added. Madison's "Thanksgiving Proclamations" of July 9, 1812; July 23, 1813; and November 16, 1814 are republished in the Addenda and taken from the same source.

[64] Fleet, "Madison's 'Detached Memoranda'," see especially the general discussion on "Banks," pp. 548-50, and the section on "Monopolies" of various kinds, including "Ecclesiastical Endowments," beginning on p. 551.

analyst evaluating Mr. Nixon as President—to write that: "Richard Nixon believed that surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional." Indeed, the "Detached Memoranda" is appropriately named, for it reflects ideas certainly "detached" from views Madison expounded in the Congress and the White House. While "foolish consistency" may indeed be "the hobgoblin of little minds," the repudiation of one's actions taken when in public power, by an elderly statesman out of power, is hardly a solid base upon which to build a convincing historical argument, much less constitutional law. Obviously the Madison of the "Detached Memorada" is not the Madison responsible for the First Amendment nor the President who issued Proclamations of days of Thanksgiving and Prayer. One cannot in good conscience and dispassionate scholarship make consistent—the inconsistent.

The Quest for Mr. Jefferson

If there is one of the Founders of the Republic who justly ranks above James Madison in the cause of religious disestablishment, it must be Thomas Jefferson. So proud was Jefferson of the victory disestablishing the Episcopal Church in Virginia that he authorized his "Virginia Statute of Religious Liberty of 1786" to be listed on his tombstone along with two other deeds for which he wanted to be remembered: "Author of the Declaration of American Independence" and "Father of the University of Virginia." [65] No mention is made that he was, among other things, the third President of the United States.

That Mr. Jefferson favored the separation of Church and State is not questioned here, but whether Pfeffer and other scholars of the "broad interpretation" of the Establishment of Religion Clause read Jefferson correctly as to

[65] Saul K. Padover, *The Complete Jefferson* (Freeport, N.Y.: Books for Libraries Press, 1969); p. 1300.

what he meant and subscribed to as "separation of Church and State" *is very much in dispute here.* As with Madison, it seems clear to me that the interpretation which I ascribe to the religious prohibitions of the Establishment Clause—a view which Pfeffer labels "narrow" —is more consistent with Jefferson's ideas and actions than are those who subscribe to Pfeffer's "broad" interpretive approach.

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In his "Third Annual Message," to the Senate and House of Representatives on October 17, 1803, President Jefferson indicated that the "friendly tribe of Kaskaskia Indians . . . has transferred its country to the United States, reserving only for its members what is sufficient to maintain them in an agricultural way." [69] Following this message on October 31, 1803, Jefferson asked the Senate to advise and consent to the treaty mentioned in this message: [70]

> I now lay before you the treaty mentioned in my general message at the opening of the session as having been concluded with the Kaskaskia Indians for the transfer of their country to us under *certain reservations and conditions.*[71]

Although Pfeffer has commented that "direct grants of money or property to institutions exclusively devoted to worship, *such as churches,* are rare, *and their unconstitutionality is clear,*" [72] President Jefferson asked the Senate to ratify a treaty in which one of the conditions was the use of federal money to support a Catholic priest in his priestly duties, and further to provide money to build a

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[69] Richardson, *A Compilation of Messages,* Vol. I, p. 359.

[70] Ibid., p. 363.

[71] Ibid. Emphasis added.

[72] Pfeffer, *Church, State, and Freedom,* p. 196. Emphasis added.

church.[73] The Third Article of the treaty in part provided:

> *And whereas, The greater part of the said tribe have been baptised and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.* The stipulations made in this and the preceding article, together with the sum of five hundred and eighty dollars, which is now paid or assured to be paid for the said tribe for the purpose of procuring some necessary articles, and to relieve them from debts which they have heretofore contracted, is considered as a full and ample compensation for the relinquishment made to the United States in the first article.[74]

The Proclamation of the Ratified Treaty was issued on December 23, 1803,[75] approximately one month after Jefferson laid it before both Houses of Congress "in their legislative capacity" on November 25, 1803, presumably for the appropriation of necessary funds to execute the treaty commitments.[76]

Lest it be argued to the contrary, if Jefferson had thought the "Kaskaskia Priest-Church Treaty Provision" was unconstitutional, he could have followed other alter-

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[73] Richard Peters, Esq., ed., *The Public Statutes at Large of the United States of America,* Vol. VII (Boston: Charles C. Little and James Brown, 1848), pp. 78-79.

[74] Ibid., p. 79. Emphasis added.

[75] Ibid., p. 78.

[76] Richardson, *A Compilation of the Messages,* Vol. I, p. 365.

natives. An unspecified lump sum of money could have been put into the Kaskaskia treaty together with another provision for an annual unspecified stipend with which the Indians could have built their church and paid their priest. Such unspecified sums and annual stipends were not uncommon and were provided for in at least two other Indian treaties made during the Jefferson Administration—one with the Wyandots and other tribes, proclaimed April 24, 1806,[77] and another with the Cherokee nation, proclaimed May 23, 1807.[78]

Furthermore, if Jefferson had had doubts about violating any part of the *Constitution*, including the First Amendment, he certainly must have been aware that under Article VI of the Federal *Constitution*, "all treaties made or which shall be made under the authority of the United States" are listed third as the "Supreme Law of the Land"—the *Constitution* itself having primacy[79]—and that consequently the treaty would be unconstitutional. The conclusion seems inescapable that Pfeffer's version of Jefferson surely would not have used his constitutional prerogatives to submit, sign, request, and spend federal monies for a treaty that hardly reflects "the principle of complete independence of religion and government."

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After the adoption of the Federal *Constitution* in 1788 and the addition in 1791 of the First Amendment with

[77] Peters, *Public Statutes at Large*, Vol. VII, "Treaty with the Wyandots, etc.," 1805, Art. IV, p. 88.

[78] Ibid., "Treaty with the Cherokees," 1806, Art. II, p. 102.

[79] In *Reid v. Covert*, 354 U.S. 1 (1957), although there was no opinion of the Court, the judgment of the Court, announced by Justice Black, indicated that "[N]o agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." Id. at 16. On this point it appears his view was not challenged by the other opinions.

its Establishment of Religion Clause, the Fourth Congress in 1796 enacted at least two "Land Statutes." . . . The second law, approved June 1, 1796 and entitled "An Act regulating *the grants of land* appropriated for Military services and for the Society of the United Brethren, for propagating the Gospel among the Heathen," was distinctly different.[93] Like the preceding Federal statute, this one detailed the lands to be granted; Section Two, however, provided, in part, that "the patents for all lands located under the authority of this act, shall be granted . . . *without requiring any fee therefor.*"[94] Section Five of the law provides that:

> And be it further enacted, That the said surveyor general be, and he is hereby, required to cause to be surveyed there several tracts of land, containing four thousand acres each, at Shoenbrun, Gnadenhutten, and Salem; being the tracts formerly set apart, by an ordinance of Congress of the third of September, one thousand seven hundred and eighty-eight, *for the society of United Brethren for propagating the gospel among the heathen*; and to issue a patent or patents for the said three tracts to the said society, in trust, for the uses and purposes in the said ordinance set forth.[95]

[93] Ibid., Chap. 46, pp. 490-91. Emphasis added.

[94] Ibid., p. 491. Emphasis added. In *Church, State, and Freedom*, Pfeffer is careful to point out that after the new Federal Congress reenacted the *Northwest Ordinance*, *Public Statutes at Large*, Vol. I, First Congress, Sess. I, Chap. 8, August 7, 1789, p. 50, "no tracts of land for the support of religion" were granted under the Ordinance after the *Constitution* and the First Amendment were adopted. Pfeffer, *op. cit.*, p. 121. While this may be true, Professor Pfeffer neglects to mention the new Federal statutes under discussion here which clearly document that, after the adoption of both the *Constitution* and the First Amendment, Congress did provide "land for the support of religion."

[95] *Public Statutes at Large*, Vol. I, "Acts of the Fourth Congress," Sess. I, chap. 46, p. 491. Emphasis added.

As is evident from its name, this Society was concerned with more than merely controlling and using land set aside, in trust, for the Indians who were already Christians. In addition to exercising their trust in the interest of the Christian Indians living on portions of this land, the Society used some of the resources derived from the cultivation of these lands, and land leases sold to white tenant farmers, to convert souls "from among the neighboring heathen" and to send out missionaries to proselytize.[96]

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The Seventh Congress extended the life of the Statute twice. On April 26, 1802, the new cutoff date was set at January 1, 1803.[103] On March 3, 1803, the Congress passed "An Act to revive and continue in force, an act in addition to an act intituled etc." which was to continue in force until April 1, 1804.[104] Before the April 1, 1804 deadline, however, the Eighth Congress, on March 19, 1804, extended the 1796 Law, as amended, until April 1, 1805. This, the last renewal, had a new statutory name: "An Act granting further time for locating military land warrants, and for other purposes."[105] The "other pur-

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[96] *American State Papers*, Class II, *Indian Affairs*, Volume II, *Documents, Legislative and Executive, of the Congress of the United States*, 17th Congress, 2d. Session, Document No. 189, "Progress of the Society of United Brethren In Propagating the Gospel Among the Indians," pp. 376-77.

[103] Ibid., Vol. II, "Acts of the Seventh Congress," Sess. I, Chap. 30, pp. 155-56.

[104] Ibid., Vol. II, "Acts of the Seventh Congress," "An Act to revive and continue in force, an act in addition to an act intituled 'An Act in addition to an act regulating grants of land appropriated for Military Services and for the Society of the United Brethren for propagating the Gospel among the Heathen,' and for other purposes," Sess. II, Chap. 30, pp. 236-37.

[105] Ibid., Vol. II, "Acts of the Eighth Congress," Sess. I, Chap. 26, pp. 271-72.

poses" were in part the propagating of "the gospel among the heathen."[106] The text of the last "revival" reads:

> Chap. XXVI.—An Act granting further time for locating military land warrants, and for other purposes.
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> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act intituled "An Act in addition to an act, intituled An act in addition to an act regulating *the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen,*" approved the twenty-sixth day of April, eighteen hundred and two, be, and the same *is hereby revived and continued in force*, until the first day of April, one thousand eight hundred and five: Provided, however, that the holders or proprietors of warrants or registered certificates, shall and may locate the same, only on any unlocated parts of the fifty quarter townships, and the fractional quarter townships, which had been reserved for original holders, by virtue of the fifth section of an act, intituled "An act in addition to an act, intituled An act regulating *the grants of land* appropriated for military services, and for *the society of the United Brethren for propagating the gospel among the heathen*:" And provided also, that no holder or proprietor of warrants or registered certificates, shall be permitted to locate the same by virtue of this act, unless the Secretary of War shall have made an endorsement on such warrant or registered certificate, certifying that no warrant has been issued for the same claim to military bounty land, and by virtue of the second section of the act, intituled "*An act to revive and continue in force an act in addi-*

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[106] Ibid., p. 271.

tion to an act intituled An act in addition to an act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes," approved the third day of March, eighteen hundred and three.

Approved, March 19, 1804.[107]

Thomas Jefferson, who was President of the United States during the terms of the Seventh and Eighth Congresses, vetoed not one of the last three extensions of this Act. Like Washington and Adams had done before him, Jefferson signed them into law. Certainly Jefferson, who did not issue Thanksgiving Day Proclamations because he thought that they conflicted with the Establishment Clause's limitations on the Federal Government, would have vetoed these Acts if he had believed that they violated the First Amendment. Pfeffer's suggestion that in "his adult life Jefferson never swerved from his devotion to the principle of complete independence of religion and government" is not borne out by historical evidence.[108] This does not mean that Jefferson violated the First Amendment by signing these Acts of Congress. These historical facts indicate that Jefferson, unlike Pfeffer, *did not see the First Amendment and the Establishment Clause requiring a "complete independence of religion and government."* To conclude otherwise is to virtually force us to imply—if not to state outright—that either Jefferson was not an "adult" when in the White House or that he not only "swerved" from his principles concerning Church and State, in these instances he completely ignored them. Just as a Jefferson without deep convictions about the relationship between government and religion is incompatible with the author of the "Virginia Statute of Religious Liberty," so is Pfeffer's view

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[107] Ibid., pp. 271-72. Emphasis added.

[108] Pfeffer, *Church, State, and Freedom*, p. 105.

of Jefferson's principles concerning the relationship between Church and State irreconcilable with Jefferson's treaty provision to build a church and support a priest, as well as signing federal land grants being given in trust to a religious society for the purpose of preaching the Gospel to the Indians. From these instances alone, it seems irrefutable that Professor Pfeffer's Jefferson was not the third President of the United States.

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In order to illustrate the enormity of [Pfeffer's] error on this historical point, however, a few of the many official United States reports pertaining to this matter are reproduced here as documentation of my preceding statements.

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